

# The Manitoba Hydro Act

## Price of power sold by corporation

1. **39(1)** The prices payable for power supplied by the corporation shall be such as to return to it in full the cost to the corporation, of supplying the power, including

(a) the necessary operating expenses of the corporation, including the cost of generating, purchasing, distributing, and supplying power and of operating, maintaining, repairing, and insuring the property and works of the corporation, and its costs of administration;

(b) all interest and debt service charges payable by the corporation upon, or in respect of, money advanced to or borrowed by, and all obligations assumed by, or the responsibility for the performance or implementation of which is an obligation of the corporation and used in or for the construction, purchase, acquisition, or operation, of the property and works of the corporation, including its working capital, less however the amount of any interest that it may collect on moneys owing to it;

(c) the sum that, in the opinion of the board, should be provided in each year for the reserves or funds to be established and maintained pursuant to subsection 40(1).

## Fixing of price by corporation

**39(2)** Subject to Part IV of *The Crown Corporations Public Review and Accountability Act* and to subsection (2.1), the corporation may fix the prices to be charged for power supplied by the corporation.

## Equalization of rates

**39(2.1)** The rates charged for power supplied to a class of grid customers within the province shall be the same throughout the province.

## Interpretation

**39(2.2)** For the purpose of subsection (2.1),

(a) grid customers are those who obtain power from the corporation's main interconnected system for transmitting and distributing power in Manitoba; and

(b) customers shall not be classified based solely on the region of the province in which they are located or on the population density of the area in which they are located.

**39(3) to (7)** [Repealed] S.M. 1988-89, c. 23, s. 34.

# The Crown Corporations Public Review and Accountability Act

## PART IV

### 1. PUBLIC UTILITIES BOARD REVIEW OF RATES

Hydro and MPIC rates review

**26(1)** Notwithstanding any other Act or law, rates for services provided by Manitoba Hydro and the Manitoba Public Insurance Corporation shall be reviewed by The Public Utilities Board under *The Public Utilities Board Act* and no change in rates for services shall be made and no new rates for services shall be introduced without the approval of The Public Utilities Board.

Definition, "rates for services"

**26(2)** For the purposes of this Part, "**rates for services**" means

(a) [repealed] S.M. 1995, c. 33, s. 5;

(b) in the case of Manitoba Hydro, prices charged by that corporation with respect to the provision of power as defined in *The Manitoba Hydro Act*;

(c) in the case of the Manitoba Public Insurance Corporation, rate bases and premiums charged with respect to compulsory driver and vehicle insurance provided by that corporation.

Application of Public Utilities Board Act

**26(3)** *The Public Utilities Board Act* applies with any necessary changes to a review pursuant to this Part of rates for services.

Factors to be considered, hearings

**26(4)** In reaching a decision pursuant to this Part, The Public Utilities Board may

(a) take into consideration

(i) the amount required to provide sufficient moneys to cover operating, maintenance and administration expenses of the corporation,

(ii) interest and expenses on debt incurred for the purposes of the corporation by the government,

(iii) interest on debt incurred by the corporation,

(iv) reserves for replacement, renewal and obsolescence of works of the corporation,

(v) any other reserves that are necessary for the maintenance, operation, and replacement of works of the corporation,

(vi) liabilities of the corporation for pension benefits and other employee benefit programs;

- (vii) any other payments that are required to be made out of the revenue of the corporation,
  - (viii) any compelling policy considerations that the board considers relevant to the matter,**
  - (ix) any other factors that the board considers relevant to the matter; and**
- (b) hear submissions from any persons or groups or classes of persons or groups who, in the opinion of the board, have an interest in the matter.

## **The Public Utilities Board Act**

### Initiation of inquiries

**27(1)** The board may of its own motion, and shall upon the request of the Legislature or the Lieutenant Governor in Council, inquire into, hear, and determine any matter or thing within its jurisdiction.

Power to inspect, examine witnesses, documents, etc.

**27(2)** The board, or any person authorized by the board to make inquiry or report, may, where it appears expedient,

- (a) enter upon and inspect any place, building, works or other property;
- (b) require the attendance of all such persons as it or he thinks fit to summon and examine and take the testimony of the persons;
- (c) require the production of all books, plans, specifications, drawings and documents;
- (d) administer oaths, affirmations, or declarations, and summon witnesses, enforce their attendance, and compel them to give evidence and produce the books, plans, specifications, drawings, and documents, which it or he may require them to produce.

Authority of officers of the board to administer oaths, etc.

**27(3)** The board may authorize the secretary of the board, or any person acting as secretary of the board, to administer oaths, affirmations, or declarations, at any hearing or investigation conducted by or for the board.

Power to require doing of acts

**28(1)** In matters within its jurisdiction, the board may order and require any owner of a public utility, person, municipality, or other corporation to do any act, matter, or thing that the owner of the public utility, person, municipality, or other corporation is or may be required to do under this

Act or any other Act of the Legislature or under any order, regulation, direction, or agreement.

Method of performance

**28(2)** Any act, matter, or thing ordered and required to be done under subsection (1) shall be done

(a) forthwith, or within or at any time specified in the order; and

(b) in any manner prescribed by the board, so far as it is not inconsistent with this Act or any other Act of the Legislature conferring jurisdiction upon the board.

Hearings by single member

**31(1)** A single member may hear an application, petition, matter, or complaint, over which the board has jurisdiction under this or any other Act of the Legislature; and after the hearing, the member shall report thereon fully to the board; and the board may thereupon deal with the application, petition, matter, or complaint, as if the hearing had been before the full board.

Proviso as to chairman

**31(2)** Where the single member hearing an application, petition, matter or complaint under subsection (1), is the chairman and the application, petition, matter, or complaint, is one respecting which notice is not required to be given, or, being required, has been duly given and the application, petition, matter or complaint is unopposed, he has, and may exercise, any power of the board relating thereto, or he may hear it and report thereon to the board to be dealt with by it as provided in subsection (1).

Further evidence

**31(3)** The board is not limited to the contents of a report made under subsection (1) or (2), but may require and hear further evidence.

## **Public Utilities Act, RSNS 1989, c 380**

### **Equal rates and charges for similar services**

67 (1) All tolls, rates and charges shall always, under substantially similar circumstances and conditions in respect of service of the same description, be charged equally to all persons and at the same rate, and the Board may by regulation declare what shall constitute substantially similar circumstances and conditions. (2) The taking of tolls, rates and charges contrary to the provisions of this Section and the regulations made pursuant thereto is prohibited and declared unlawful. R.S., c. 380, s. 67.



2008 CarswellOnt 2830  
Ontario Superior Court of Justice (Divisional Court)

Advocacy Centre for Tenants-Ontario v. Ontario (Energy Board)

2008 CarswellOnt 2830, [2008] O.J. No. 1970, 166 A.C.W.S. (3d) 384, 238 O.A.C. 343, 293 D.L.R. (4th) 684

**Advocacy Centre for Tenants-Ontario and Income Security  
Advocacy Centre on behalf of Low-Income Energy Network  
(Appellant) and Ontario Energy Board (Respondent)**

Cumming J., Kiteley J., and Swinton J.

Heard: February 25, 2008

Judgment: May 16, 2008

Docket: Toronto 273/07

Counsel: Paul Manning, Mary Truemner for Appellant  
Michael Miller for Ontario Energy Board  
Fred Cass, David Stevens for Enbridge Gas Distribution Inc.  
Robert Warren for Consumers Council of Canada

Subject: Public; Constitutional

**Related Abridgment Classifications**

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

**Headnote**

**Public law --- Public utilities — Regulatory boards — Practice and procedure — Judicial review — Jurisdiction of board**

Utility company E Inc. applied before provincial energy board for approval of yearly distribution rates — Consumer advocacy network intervened at hearing in opposition of approval — Network sought introduction of rate affordability assistance program to make gas distribution rates affordable to low income consumers — Board refused to act on network's proposal — Board determined that it lacked jurisdiction to order implementation of low income affordability program — Network appealed from board's decision — Appeal allowed — Board had jurisdiction to establish rate affordability assistance plan for low income consumers purchasing distribution of natural gas from E Inc. — Board had to determine just and reasonable rates within context of objectives in s. 2 of Ontario Energy Board Act, 1998, which includes protecting interests of consumers with respect to prices — It was established that Board had jurisdiction to take into account ability to pay in setting rates, considering expansive wording of s. 36(2) and (3) of Act and purpose of legislation within context of Board's statutory objectives in s. 2, and being mindful of history of rate setting to date in giving efficacy to promotion of that legislative purpose.

The Ontario Energy Board (Board) was the provincial economic regulator for natural gas and electricity sectors in the province. A utility, E Inc., applied for approval of its annual gas distribution rates. A low-income energy advocacy group (LIEN) intervened in the application, alleging that the interests of low-income consumers were not protected without a rate affordability assistance program.

A majority of the Board held that LIEN's proposal amounted to an income redistribution scheme and determined that the Ontario Energy Board Act, 1998 did not explicitly grant the Board jurisdiction to order the implementation of a low income affordability program. The Board also held that it did not gain jurisdiction through the doctrine of necessary implication.

LIEN appealed, seeking a declaration that the Board had jurisdiction to order a rate affordability assistance program for low income consumers of E Inc. within its franchise areas.

**Held:** The appeal was allowed.

(Per curiam): The Board had jurisdiction to establish a rate affordability assistance plan for low income consumers purchasing the distribution of natural gas from E Inc. The Board was authorized to employ any method or technique that it considered appropriate to fix just and reasonable rates. Although "cost of service" was necessarily a fundamental factor and starting point for determining rates, the Board had to determine just and reasonable rates within the context of the objectives in s. 2 of the Act, which includes protecting the interests of consumers with respect to prices.

The Board had jurisdiction to take into account ability to pay in setting rates, taking into account the expansive wording of s. 36(2) and (3) of the Act, considering the purpose of the legislation within the context of the Board's statutory objectives seen in s. 2, and being mindful of the history of rate setting to date in giving efficacy to the promotion of that legislative purpose.

(Per Swinton J., dissenting): The appeal should be dismissed. The Board was correct in concluding that it lacked jurisdiction to make the order sought. It was inevitable that the Board, in setting lower rates for the economically disadvantaged, would have to impose higher rates on other consumers. The Board's objectives are narrowly confined, and the Board's mandate did not include consideration of the economic and social requirements of consumers.

Were the Board to assume jurisdiction over a rate affordability assistance program, it would be taking on a significant new role as a regulator of social policy. Given that it would be a dramatic change in the role the Board historically played, as well as a departure from common law principles, it would require express language from the legislature to confer such jurisdiction. A determination of the need for a subsidy for low income consumers was better made by the legislature, which had the ability to consider the full range of existing programs and a wide range of funding options.

## Table of Authorities

### Cases considered:

*ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)* (2006), 263 D.L.R. (4th) 193, 344 N.R. 293, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, 2006 CarswellAlta 139, 2006 CarswellAlta 140, 2006 SCC 4, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, [2006] 1 S.C.R. 140 (S.C.C.) — considered

*Canada (Attorney General) v. Toronto (City)* (1893), 23 S.C.R. 514, 1893 CarswellOnt 37 (S.C.C.) — referred to

*Chastain v. British Columbia Hydro & Power Authority* (1972), [1973] 2 W.W.R. 481, 32 D.L.R. (3d) 443, 1972 CarswellBC 287 (B.C. S.C.) — referred to

*Dalhousie Legal Aid Service v. Nova Scotia Power Inc.* (2006), 2006 NSCA 74, 2006 CarswellNS 249, 268 D.L.R. (4th) 408, 245 N.S.R. (2d) 206, 777 A.P.R. 206 (N.S. C.A.) — considered

*Enbridge Gas Distribution Inc., Re* (April 26, 2007), Doc. EB-2006-0034 (Ont. Energy Bd.) — referred to

*Enbridge Gas Distribution Inc. v. Ontario (Energy Board)* (2005), 26 Admin. L.R. (4th) 233, 75 O.R. (3d) 72, 2005 CarswellOnt 763, 195 O.A.C. 234 (Ont. Div. Ct.) — considered

*Garland v. Consumers' Gas Co.* (2000), 2000 CarswellOnt 1408, 185 D.L.R. (4th) 536 (Ont. S.C.J.) — considered

*Multi-Malls Inc. v. Ontario (Minister of Transportation & Communications)* (1976), 1976 CarswellOnt 860, 14 O.R. (2d) 49, 73 D.L.R. (3d) 18 (Ont. C.A.) — considered

*Natural Resource Gas Ltd. v. Ontario (Energy Board)* (2005), 2005 CarswellOnt 1569, 197 O.A.C. 310 (Ont. Div. Ct.) — considered

*R. v. Jackpine* (2006), (sub nom. *R. v. Rodgers*) 140 C.R.R. (2d) 1, 210 O.A.C. 200, 2006 SCC 15, 2006 CarswellOnt 2498, 2006 CarswellOnt 2499, 207 C.C.C. (3d) 225, (sub nom. *R. v. Rodgers*) [2006] 1 S.C.R. 554, 37 C.R. (6th) 1, 347 N.R. 201, 266 D.L.R. (4th) 101 (S.C.C.) — referred to

*Rate Concessions to Poor Persons & Senior Citizens, Re* (1976), 14 P.U.R. 4th 87 (U.S. Or. P.U.C.) — referred to

*St. Lawrence Rendering Co. v. Cornwall (City)* (1951), [1951] 4 D.L.R. 790, 1951 CarswellOnt 74, [1951] O.R. 669 (Ont. H.C.) — referred to

*State ex rel. Guste v. Council of New Orleans (City)* (1975), 309 So. 2d 290 (U.S. La. S.C.) — referred to

*Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. U.E.S., local 298* (1988), 95 N.R. 161, 89 C.L.L.C. 14,045, 24 Q.A.C. 244, (sub nom. *Union des employés de service, local 298 v. Bibeault*) [1988] 2 S.C.R. 1048, 1988 CarswellQue 125, 1988 CarswellQue 148, 35 Admin. L.R. 153 (S.C.C.) — referred to

*Union Gas Ltd. v. Ontario (Energy Board)* (1983), 43 O.R. (2d) 489, 1 D.L.R. (4th) 698, 1983 CarswellOnt 919 (Ont. Div. Ct.) — referred to

*Washington Gas Light Co. v. Public Service Commission of the District of Columbia* (1982), 450 A.2d 1187 (U.S. D.C. Ct. App.) — referred to

#### Cases considered by *Swinton J.*:

*Allstream Corp. v. Bell Canada* (2005), 338 N.R. 177, 2005 CarswellNat 5049, 2005 CAF 247, 2005 FCA 247, 2005 CarswellNat 1970 (F.C.A.) — considered

*ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)* (2006), 263 D.L.R. (4th) 193, 344 N.R. 293, 39 Admin. L.R. (4th) 159, 380 A.R. 1, 363 W.A.C. 1, 2006 CarswellAlta 139, 2006 CarswellAlta 140, 2006 SCC 4, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, [2006] 1 S.C.R. 140 (S.C.C.) — considered

*Canada (Attorney General) v. Toronto (City)* (1893), 23 S.C.R. 514, 1893 CarswellOnt 37 (S.C.C.) — referred to

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*Dalhousie Legal Aid Service v. Nova Scotia Power Inc.* (2006), 2006 NSCA 74, 2006 CarswellNS 249, 268 D.L.R. (4th) 408, 245 N.S.R. (2d) 206, 777 A.P.R. 206 (N.S. C.A.) — considered



*Edmonton (City) v. Northwestern Utilities Ltd.* (1929), [1929] 2 D.L.R. 4, [1929] S.C.R. 186, 1929 CarswellAlta 114 (S.C.C.) — referred to

*ENMAX Power Corp., Re* (2004), 2004 CarswellAlta 2078 (Alta. E.U.B.) — referred to

*Garland v. Consumers' Gas Co.* (2000), 2000 CarswellOnt 1408, 185 D.L.R. (4th) 536 (Ont. S.C.J.) — considered

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*Rate Concessions to Poor Persons & Senior Citizens, Re* (1976), 14 P.U.R. 4th 87 (U.S. Or. P.U.C.) — considered

*St. Lawrence Rendering Co. v. Cornwall (City)* (1951), [1951] 4 D.L.R. 790, 1951 CarswellOnt 74, [1951] O.R. 669 (Ont. H.C.) — referred to

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*Washington Gas Light Co. v. Public Service Commission of the District of Columbia* (1982), 450 A.2d 1187 (U.S. D.C. Ct. App.) — referred to

#### Statutes considered:

*Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 15 — referred to

s. 15(1) — referred to

*Energy Costs Assistance Measures Act*, S.C. 2005, c. 49

Generally — referred to

*Income Tax Act*, R.S.O. 1990, c. I.2

s. 8.6.1 [en. 2006, c. 18, s. 1] — referred to

*Legislation Act, 2006*, S.O. 2006, c. 21, Sched. F

s. 64(1) — referred to

*Ontario Energy Board Act*, R.S.O. 1980, c. 332

s. 19 — referred to

s. 19(2) — referred to

*Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B

Generally — considered

s. 2 — referred to

s. 27 — referred to

s. 33 — referred to

s. 36 — considered

s. 36(1) — referred to

s. 36(2) — considered

s. 36(3) — considered

s. 79 — considered

s. 79(1) — referred to

*Ontario Energy Board, Act to establish the*, S.O. 1960, c. 75

s. 17(1) — referred to

*Power Corporation Act*, R.S.O. 1990, c. P.18

s. 108 — referred to

*Public Utilities Act*, R.S.N.S. 1989, c. 380

s. 67(1) — referred to

*Telecommunications Act*, S.C. 1993, c. 38

s. 2(5) — referred to

s. 2(6) — referred to

s. 7 — considered

s. 7(a) — referred to

s. 7(h) — referred to

s. 27(2)(b) — referred to

s. 27(6) — referred to

APPEAL by intervenor from provincial energy board's decision that it lacked jurisdiction to implement certain energy rate proposal.

**Per Curiam:**

**The Appeal**

1 The Respondent Ontario Energy Board (the "Board") is the provincial economic regulator for the natural gas and electricity sectors. The Board exercises its jurisdiction within the statutory authority established by the Legislature, being the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B (the "Act").

2 By a majority (2:1) decision dated April 26, 2007, the Board determined that the *Act* does not explicitly grant to the Board jurisdiction to order the implementation of a low income affordability program: *Enbridge Gas Distribution Inc., Re* (April 26, 2007), Doc. EB-2006-0034 (Ont. Energy Bd.) (the "Board Decision"). The Board also found that the Board does not gain the requisite jurisdiction through the doctrine of necessary implication.

3 Enbridge Gas Distribution Inc. ("EGD") sought approval by the Board of EGD's 2007 gas distribution rates based simply upon the Board's traditional, standard "cost of service" ratemaking principles. The Appellant Low Income Energy Network ("LIEN") had intervened in the application before the Board. LIEN argues that without a rate affordability program, the interests of low-income consumers are not protected. LIEN proposed that the Board accept as an issue in the EGD proceeding the following matter:

Should the residential rate schedules for EGD include a rate affordability assistance program for low-income consumers? If so, how should such a program be funded? How should eligibility criteria be determined? How should levels of assistance be determined?

4 LIEN seeks from the Board the introduction of a rate affordability assistance program to make natural gas distribution rates affordable to poor people. The underlying premise of the proposal of LIEN is that low income consumers (estimated to be about 18% of households in Ontario) should pay less for gas distribution services than other consumers. LIEN emphasizes that the supply of natural gas (or other source of energy) serves to meet basic human needs such as warmth from heating and the generation of power. Those who cannot afford to use natural gas as a source of energy may be placed at a significant disadvantage. LIEN submits that the Board can consider ability to pay in setting rates if it is necessary to meet broad public policy concerns. Access to an essential service is arguably such a concern. The supply of natural gas can be considered a necessity that is available from a single source with prices set by the Board in the public interest.

5 The majority of the Board held that the LIEN proposal amounted to an income redistribution scheme. The Board noted that such a scheme would require a consumer rate class based upon income characteristics and would implicitly require subsidization of this new class by other rate classes. It is undisputed that a common, if not universal, historical feature of rate-making for a natural monopoly is the application of the same charges to all consumers within a given consumer classification based upon cost of service, that is, cost causality.

6 Section 33 of the *Act* provides for an appeal to this Court on a question of law or jurisdiction. LIEN seeks a declaration that the Board has the jurisdiction to order a "rate affordability assistance program" for low income consumers of the utility, EGD, within its franchise areas as the distributor of natural gas.

7 The position of EGD, the Board and the intervenor, the Consumers Council of Canada, is that LIEN's quite understandable and commendable concern is an issue of public policy to be dealt with by the Legislature and falls outside the jurisdiction of the Board.

### **The Standard of Review**

8 The issue is whether the Board is correct in its determination that it does not have jurisdiction to implement a low income affordability program.

9 There is common ground that the standard of review is correctness. That is, this Court will interpret the statutory grant of authority on the basis of its own opinion as to a statute's construction, rather than deferring to the Board's determination of the issue. A tribunal's determination that it has no jurisdiction will be set aside as a "wrongful declining of jurisdiction" if the Court is of the view that the tribunal's decision is wrong. Donald J.M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada*, looseleaf (Toronto: Canvasback Publishing, 1998) at 14-3 to 14-4.

### **Analysis of the Board's Jurisdiction**

#### ***A. Applicable Principles***

10 The Court is to be guided by the principles of statutory interpretation as set forth in Ruth Sullivan, *Driedger on the Construction of Statutes*, 3<sup>rd</sup> ed., (Toronto: Butterworths, 1994) at 131:

There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just.

11 The words of the *Act* are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme and object of the legislation and the Legislature's intent. *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140 (S.C.C.) at para. 37 [*Atco*].

12 The statute shall be interpreted as being remedial and given such "fair, large and liberal interpretation as best ensures the attainment of its objects." *Legislation Act*, S.O. 2006, c. 21, Schedule F, s. 64 (1).

13 A statutory administrative tribunal obtains its jurisdiction from two sources: explicit powers expressly granted by statute, and implicit powers by application of the common law doctrine of jurisdiction by necessary implication. *ATCO*, *supra*, at para. 38.

14 The Court must apply a "pragmatic or functional" analysis in determining the issue of jurisdiction, by considering the wording of the *Act* conferring jurisdiction upon the Board, the purpose of the *Act* creating the Board, the reason for the Board's existence, the area of expertise of its members and the nature of the problem before the Board. *Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. U.E.S., local 298*, [1988] 2 S.C.R. 1048 (S.C.C.) at 1088.

### ***B. The Wording of the Act***

15 Section 36 of the *Act* confers the Board's jurisdiction:

36.(1) No gas transmitter, gas distributor or storage company shall sell gas or charge for the transmission, distribution or storage of gas except in accordance with an order of the Board, which is not bound by the terms of any contract.

.....

(2) The Board may make orders approving or fixing just and reasonable rates for the sale of gas by gas transmitters, gas distributors and storage companies, and for the transmission, distribution and storage of gas.

(3) In approving or fixing just and reasonable rates, the Board may adopt any method or technique that it considers appropriate.

16 LIEN submits that the Board's authority to fix "just and reasonable rates" by adopting "any method or technique it considers appropriate", conferred by s. 36 (2) and (3) of the *Act* is very broad and the statutory language must be given its ordinary meaning.

17 The Board argues that the word "rates" is in the plural form in s. 36 (2) to allow the Board to set different rates for different classes of consumers based upon the costs of serving those consumers. For example, large industrial users are typically considerably more expensive to serve than residential consumers. Separate rate classes are a necessity to ensure that consumers reimburse for the actual costs of the service they receive.

18 The majority opinion in the Board Decision is of the view that the words "any method or technique" cannot reasonably be interpreted to mean "a fundamental replacement of the rate making process based on cost causality with one based on income level as a rate grouping determinant." (p.9)

19 The phrase "approving or fixing just and reasonable rates" in the present s. 36 (2) was first introduced by s. 17 (1) of Bill 38, *An Act to Establish the Ontario Energy Board*, 1<sup>st</sup> Sess., 26<sup>th</sup> Leg., Ontario, 1960 by the then Minister of Energy Resources, the Hon. Robert Macaulay. He outlined for the Legislature the philosophy underlying rate setting (*Legislature of Ontario Debates*, 9 (8 February 1960) at 199 (Hon. Macaulay)):

First, why are there rate controls? There are rate controls because, in effect, the distribution of natural gas is a monopoly, a public utility. Secondly...it is fair that whatever rate is charged should be one designated, not only in the interests of the consumer, but also in the interests of the distributor...[O]ne really should have in mind 3 basic objectives: First, the rate should be low enough to secure to the user a fair and just rate. Second, the rate should be adequate to pay for good service and replacement and retirement of the used portion of the assets. Third, it should be high enough to attract a sufficient return on capital....

20 He went on to explain the purpose of the Government's policy (at 205):

[F]irst, to protect the consumer, and to see that he pays a fair and just rate, not more or less, and that is competitive with other fuels. Second, to make sure the rate is sufficient to provide adequate service, replacements and safety for the company providing the service. Third, it is that the company should be able to charge a rate which is sufficient to attract the necessary capital to expand.

21 The present s.36 (3) replaced s.19 of the old *Ontario Energy Board Act*, R.S.O. 1980, c. 332, which required a traditional cost of service analysis in very prescriptive terms:

19 (2) In approving or fixing rates and other charges under subsection (1), the board shall determine a rate base for the transmitter, distributor or storage company, and shall determine whether the return on the rate base ...is reasonable.

The rate base ...shall be the total of,

- (a) a reasonable allowance for the cost of the property that is used or useful in serving the public, less an amount considered adequate by the Board for depreciation, amortization and depletion;
- (b) a reasonable allowance for working capital; and
- (c) such other amounts as, in the opinion of the Board, ought to be included.

22 The authority was granted in s. 36 (3) to use "any method or technique it considers appropriate" in approving "just and reasonable rates" i.e., employing methods other than simply on a traditional cost of service basis as proscribed in the repealed s. 19 to set rates for the gas sector. This aligned the approach for natural gas with the non-prescriptive authority seen governing Ontario Hydro as a Crown corporation in rate setting for electricity distributors.

23 Thus, under the former Act the phrase "just and reasonable rates" was limited to the cost of service basis articulated in prescriptive detail in s. 19. The change in repealing s. 19 and allowing the Board to "adopt any method or technique it considers appropriate" provides greater flexibility to the Board to employ other methods of rate making in approving and fixing "just and reasonable rates" rather than simply the traditional cost of service regulation seen in the former s. 19.

24 Subsection 36 (3) allows the Board to adopt "any method or technique that it considers appropriate" in fixing "just and reasonable rates." The majority Board Decision view is that this provision, considered within the context of the *Act* as a whole, allows the Board to employ flexible techniques and methods for cost of service analyses in determining rates, for example, the incentive rate mechanisms currently used for the major gas utilities.

25 In the same rate setting proceeding that is under review, EGD reportedly asked the Board to approve two fuel-switching programs to enable residential consumers to shift from electric-water heaters to gas-water heaters, given that the latter promote conservation inasmuch as there is greater energy efficiency. The programs are identical except that there is a subsidy offered for the low income group of \$800 per participant but a subsidy of only \$600 for other consumers. Vice Chair Kaiser in dissenting points out that none of the parties have objected to this proposal and no one has argued that the Board does not have jurisdiction to approve different subsidies based upon income levels.

26 Indeed, the majority opinion in the Board Decision allows that the Board has ordered that specific funding be channeled aimed at low income consumers for "Demand Side Management Programs."

27 As well, the Board on occasion has reduced a significant rate increase because of so-called "rate shock" by spreading the increase over a number of years. Although this does not in itself suggest an unequal approach as between residential consumers it does indicate that the Board considers it has jurisdiction to take "ability to pay" into account in rate setting.

28 EGD, like other utilities, makes annual contributions to enable emergency financial relief through the so-called "Winter Warmth Program" which provides funds as a subsidy to some low income consumers, enabling them to be able to heat their homes in winter months. These subsidies are taken into account as costs of the utility in the approval and fixing of rates by the Board. Although the program is funded by all consumers, to some extent there is indirect cross-subsidization within the residential consumer class.

29 The Board points out that this is a relatively small program in the nature of a charitable objective, involving the United Way, which is specific to individual consumers in a financial crisis situation. But the fact remains that its implementation means that some residential consumers are paying less for the distribution and purchase of natural gas than other residential consumers are paying. If the Board has jurisdiction to approve utilities paying subsidies to the benefit of low income consumers then it arguably has jurisdiction to order utilities to provide special rates on a low income basis.

30 Section 79 of the *Act* explicitly authorizes the Board to provide rate protection for rural or remote consumers of an electricity distributor. The majority decision argues that it is a reasonable inference that the Legislature, by virtue of the explicit singling out of a single category of consumers in s. 79, did not intend this benefit to apply to other categories of consumers. The Board argues that if s. 36 (2) and (3) are intended to allow for differential rate setting for subsets of residential consumers, then s. 79 is unnecessary. The majority decision considers the existence of s. 79 as indicating that the Legislature has been explicit on issues that it considers warrant special treatment through a subsidy. The majority decision argues that the existence of s. 79 implicitly excludes any intent to confer jurisdiction to depart from simply the cost of service approach employed to implement the mandate given to the Board by s. 36.

31 Moreover, the majority decision points out that rural rate assistance through s. 79 does not consider income level as an eligibility determinant. Rather, eligibility is based upon location and the inherent higher costs of service related to density levels. The assistance from the program is conferred upon all consumers within a given geographical area irrespective of their income level. Hence, this program arguably serves simply to mitigate the effect of the cost differential related to geography and remains consistent with a rate making process based upon cost causality. Nevertheless, "rate protection" through s. 79 operates as a subsidy paid by some of Ontario's residential electricity consumers for the benefit of others and represents a departure from the principle of cost causality being applied on the same basis to all consumers within a given class (i.e., residential, commercial and industrial).

32 As pointed out in the dissent by Board Vice Chair Gordon Kaiser, s. 79 was introduced in 1999 when the authority to regulate rates for *electricity* distributors was transferred to the Ontario Energy Board. Prior thereto, electricity distributors were regulated by Ontario Hydro, a Crown corporation which had established the policy of setting special rates in remote and rural areas through the now repealed s. 108 of the *Power Corporation Act*, R.S.O. 1990, c. P. 18. The inference can be made, as Vice Chair Kaiser asserts, that s. 79 was introduced into the *Act* to expressly indicate to the Board that this significant historical policy must continue.

**C. The Purpose of the Act and the Reason for the Board's existence**

33 The objectives for the Board with respect to natural gas regulation are set forth in s. 2 of the *Act*:

(2) The Board, in carrying out its responsibilities under this or any other Act in relation to gas, shall be guided by the following objectives:

1. To facilitate competition in the sale of gas to users.
2. To protect the interests of consumers with respect to prices and the reliability and quality of gas service.
3. To facilitate rational expansion of transmission and distribution systems.
4. To facilitate rational development and safe operation of gas storage.
5. To promote energy conservation and energy efficiency in a manner consistent with the policies of the Government of Ontario.
  - 5.1 To facilitate the maintenance of a financially viable gas industry for the transmission, distribution and storage of gas.
6. To promote communication within the gas industry and the education of consumers.

34 The Board is charged under s. 2 of the *Act* with protecting "the interests of consumers with respect to prices ...." The Board argues that this provision speaks to consumers as a single class, not to a particular subset of consumers. The majority decision of the Board says the Board's mandate is to balance the interests of consumers as a single group with the interests of the regulated utility in the setting of "just and reasonable rates."

35 The Divisional Court has emphasized in the past that the Board's mandate to fix just and reasonable rates "is unconditioned by directed criteria and is broad; the board is expressly allowed to adopt any method it considers appropriate." *Natural Resource Gas Ltd. v. Ontario (Energy Board)*, [2005] O.J. No. 1520 (Ont. Div. Ct.) at para. 13. The Divisional Court also stated in *Enbridge Gas Distribution Inc. v. Ontario (Energy Board)*, 75 O.R. (3d) 72, [2005] O.J. No. 756 (Ont. Div. Ct.) at para.24:

...[T]he legislation involves economic regulation of energy resources, including setting prices for energy which are fair and reasonable to the distributors and the suppliers, while at the same time are a reasonable cost for the consumer to pay. This will frequently engage the balancing of competing interests, as well as consideration of broad public policy.

36 Writing for the majority of the Supreme Court of Canada in *ATCO, supra*, at para. 62 Bastarache J. stated that "[r]ate regulation serves several aims — sustainability, equity and efficiency — which underlie the reasoning as to how rates are fixed."

**D. The Area of Expertise of its Members and the Nature of the Problem before the Board**

37 The Board was asked to consider the application of the utility to establish rates. In that context, an intervenor asked the Board to consider whether, as a factor in rate-setting, the Board could consider the interests of low-income consumers and establish a rate affordability program. That issue of rate-setting is squarely within the jurisdiction of the Board.

38 The majority opinion in the Board Decision correctly states that the Board's mandate for economic regulation is "rooted in the achievement of economic efficiencies, the establishment of fair returns for natural monopolies and the development of appropriate costs allocation methodologies".. However, that does not answer the question as to the full scope of the Board's jurisdiction in approving or fixing "just and reasonable rates" and adopting "any method or technique that it considers appropriate" in so doing.

39 The Board's regulatory power is designed to act as a proxy in the public interest for competition in view of a natural gas utility's geographical natural monopoly. Absent the intervention of the Board as a regulator in rate-setting, gas utilities (for the benefit of their shareholders) would be in a position to extract monopolistic rents from consumers, in particular, given a relatively inelastic demand curve for their commodity. Clearly, a prime purpose of the *Act* and the Board is to balance the interests of consumers of natural gas with those of the natural gas suppliers. The Board's mandate through economic regulation is directed primarily at avoiding the potential problem of excessive prices resulting because of a monopoly distributor of an essential service.

40 In performing this regulatory function, it is consistent for the Board to seek to protect the interests of *all* consumers vis-a-vis the reality of a monopoly. The Board must balance the respective interests of the utility and the collective interest of all consumers in rate setting. *Union Gas Ltd. v. Ontario (Energy Board)* (1983), 1 D.L.R. (4th) 698, 43 O.R. (2d) 489 (Ont. Div. Ct.) at 501. The Board's regulatory power is primarily a proxy for competition rather than an instrument of social policy. *Dalhousie Legal Aid Service v. Nova Scotia Power Inc.* (2006), 268 D.L.R. (4th) 408 (N.S. C.A.) at para. 33 [*Dalhousie*].

41 *Dalhousie* dealt with a request for a low income affordability program like that advanced by LIEN. However, it involved a consideration of rate setting under s. 67 (1) of the Nova Scotia *Public Utilities Act*, R.S.N.S. 1989, c. 380, which is very different in wording with respect to jurisdiction to that seen in s. 36 of the *Act* at hand. The Nova Scotia provision expressly provides that "rates shall always, under substantially similar circumstances and conditions in respect of service of the same description, be charged equally to all persons and at the same rate ...." Hence, the Nova Scotia Utility and Review Board found that it did not have jurisdiction to order low income affordability programs.

42 Section 36 of the *Act* has broad language, empowering the Board to set "just and reasonable" rates for the distribution of natural gas. The supply of natural gas can be considered a necessity that is available from a single source with prices set by the Board in the public interest. The Board has traditionally set rates on a "cost of service" basis, that is, on the basis of cost causality and employing a complex cost allocation exercise. In brief, this approach first looks to the utility's capital investments and maintenance costs including a fair rate of return to determine revenues required. The revenue requirement is then divided amongst the utility's rate paying consumers on a rate class basis (i.e., residential, commercial, industrial, etc.).

43 The rates have been traditionally designed with the principled objective of having each rate class pay for the actual costs that class imposes upon the utility. That is, the Board has sought to avoid inter-class and intra class subsidies. See RP-2003-0063 (2005) at 5. Consistent with this approach, the Board has refused the establishment of a special rate class to provide redress for aboriginal consumers. *Decision with Reasons EBRO493* (1997) (O.E.B.). In that case, the Ontario Native Alliance ("ONA") requested the Board to order a utility to evaluate the establishment of a rate class for the purpose of providing a special rate class for aboriginal peoples. At 316-17, the Board stated:

The Board is required by the legislation to "fix just and reasonable rates", and in doing so it attempts to ensure that no undue discrimination occurs between rate classes, and that the principles of cost causality are followed in allocating the underlying rates. While the board recognizes ONA's concerns, the Board finds that the establishment of a special rate class to provide redress for aboriginal consumers of Centra does not meet the above criteria and it is not prepared to order the studies requested by ONA.

44 This decision would be within the Board's jurisdiction and a like response to LIEN in the case at hand would arguably be consistent and reasonable. However, the Board in dealing with the ONA request did not decline on the basis of jurisdiction. Rather, it said that it should not exercise its jurisdiction as requested by ONA for the reasons given.

45 A low income rate affordability program would necessarily lead to treating consumer groups on a differentiated basis with higher prices for a majority of residential consumers and subsidization of the low-income subset by the majority group and/or other classes of consumers.

46 If the Board were to reduce the rates for one class of consumers based upon an income determinant, the Board would have to increase the rates for another class or classes of consumers. In effect, such a rate reduction would impose a regressive



indirect tax upon those required to pick up the shortfall. Such an approach would arguably be a dramatic departure from the Board's regulatory function as implemented to date, which has been to protect the collective interest of consumers dealing with a monopoly supplier through a "cost of service" calculation and then to treat consumers equally through determining rates to pay for the "cost of service" on a cost causality basis for classes of consumers.

47 The Board's mandate has not been directed to the public interest in social or distributive justice through a differentiation of rates on the basis of income. That need is seen to be met through other mechanisms and programs legislated by the provincial Legislature and/or Parliament, for example, by refundable tax credits and social assistance.

48 Indeed, the provincial income tax legislation previously provided for public tax expenditures to assist low income consumers with rising electricity costs. This was done through an "Ontario home electricity payment" by reference to income levels. *Income Tax Act*, R.S.O. 1990, c.1.2, s. 8.6.1, as rep. by *Income Tax Amendment Act (Ontario Home Electricity Relief)*, 2006, S.O. 2006, c. 18, s. 1. As well, Parliament has provided a one-time relief for energy costs to low income families and seniors in Canada through the *Energy Costs Assistance Measures Act*, S.C. 2005, c. 49.

49 The Board is an economic regulator, rather than a formulator of social policy. While no doubt the Board must take into account broad policy considerations, rate-setting is at the core of the Board's jurisdiction. *Garland v. Consumers' Gas Co.* (2000), 185 D.L.R. (4th) 536 (Ont. S.C.J.) at paras. 17, 45-46. Special rates for low income consumers would not be based upon economic principles of regulation but rather on the social principle of ability to pay. Any program to subsidize low income consumers would require a source of funding which is a matter of public policy. See generally *Rate Concessions to Poor Persons & Senior Citizens, Re*, 14 P.U.R. 4th 87 (U.S. Or. P.U.C. 1976).

50 This view of the nature and limit of the regulatory function is generally accepted as the norm in other jurisdictions. See for example *Washington Gas Light Co. v. Public Service Commission of the District of Columbia*, 450 A.2d 1187 (U.S. D.C. Ct. App. 1982) at para. 38; *State ex rel. Guste v. Council of New Orleans (City)*, 309 So. 2d 290 (U.S. La. S.C. 1975) at 294 .

51 The historical common law approach for public utility regulation has been that consumers with similar cost profiles are to be treated equally so far as reasonably possible with respect to the rates paid for services. See, for example, *St. Lawrence Rendering Co. v. Cornwall (City)*, [1951] O.R. 669 (Ont. H.C.) at 683; *Chastain v. British Columbia Hydro & Power Authority* (1972), 32 D.L.R. (3d) 443 (B.C. S.C.) at 454 ; *Canada (Attorney General) v. Toronto (City)* (1893), 23 S.C.R. 514 (S.C.C.) at 519 -520.

### Conclusions on the Board's Jurisdiction

52 We agree that the traditional approach of "cost of service" is the root principle underlying the determination of rates by the Board because that is necessary to meet the fundamental, core objective of balancing the interests of all consumers and the natural monopoly utility in rate/price setting.

53 However, the Board is authorized to employ "any method or technique that it considers appropriate" to fix "just and reasonable rates." Although "cost of service" is necessarily an underlying fundamental factor and starting point to determining rates, the Board must determine what are "just and reasonable rates" within the context of the objectives set forth in s. 2 of the Act. Objective #2 therein speaks to protecting "the interests of consumers with respect to prices."

54 The "cost of service" determination will establish a benchmark global amount of revenues resulting from an estimated quantity of units of natural gas or electricity distributed. The Board could use this determination to fix rates on a cost causality basis. This has been the traditional approach.

55 However, in our view, the Board need not stop there. Rather, the Board in the consideration of its statutory objectives might consider it appropriate to use a specific "method or technique" in the implementation of its basic "cost of service" calculation to arrive at a final fixing of rates that are considered "just and reasonable rates." This could mean, for example, to further the objective of "energy conservation", the use of incentive rates or differential pricing dependent upon the quantity of energy consumed. As well, to further the objective of protecting "the interests of consumers" this could mean taking into account

income levels in pricing to achieve the delivery of affordable energy to low income consumers on the basis that this meets the objective of protecting "the interests of consumers with respect to prices."

56 The Board is engaged in rate-setting within the context of the interpretation of its statute in a fair, large and liberal manner. It is not engaged in setting social policy.

57 This is not, of course, to imply any preferred course of action in rate setting by the Board. The Board in its discretion may determine that "just and reasonable rates" are those that follow from the approach of "cost causality" once the "cost of service" amount is determined. That is, the principle of equality of rates for consumers within a given class (e.g., residential consumers) may be viewed as the most just and reasonable approach. A determination by the Board that all residential gas consumers (with relatively minor deviations through such programs as the "Winter Warmth Program") pay the same distribution rates is not in itself discriminatory on a prohibited ground. Indeed, it can be seen as a non-discriminatory policy in terms of prices paid.

58 Nor is it to suggest that as a matter of public policy, objectives of distributive justice or conservation in respect of energy consumption are best achieved by rate setting as compared to, for instance, tax expenditures or social assistance devised and implemented by the Legislature through mechanisms independent of the operation of the *Act*. It is noted that the Minister is given the authority in s. 27 of the *Act* to issue policy statements as to matters that the Board must pursue; however, the Minister has not issued any policy statement directing the board to base rates on considerations of the ability to pay. Moreover, the power granted to a regulatory authority "must be exercised reasonably and according to the law, and cannot be exercised for a collateral object or an extraneous and irrelevant purpose, however commendable." *Multi-Malls Inc. v. Ontario (Minister of Transportation & Communications)* (1976), 14 O.R. (2d) 49 (Ont. C.A.) at 55. As we have said, cost of service is the starting point building block in rate setting, to meet the fundamental concern of balancing the interests of all consumers with the interests of the natural monopoly utility.

59 Nor does our conclusion presume as to what methods or techniques may be available in determining "just and reasonable rates." Efficiency and equity considerations must be made. Rather, this is to say only that so long as the global amount of return to the utility based upon a "cost of service" analysis is achievable, then the rates/prices (and the methods and techniques to determine those rates/prices) to generate that global amount is a matter for the Board's discretion in its ultimate goal and responsibility of approving and fixing "just and reasonable rates."

60 The issue before the Court is that of jurisdiction, not how and the manner by which the Board should exercise the jurisdiction conferred upon it.

61 In our view, and we so find, the Board has the jurisdiction to take into account the ability to pay in setting rates. We so find having taken into account the expansive wording of s. 36 (2) and (3) of the statute and giving that wording its ordinary meaning, having considered the purpose of the legislation within the context of the statutory objectives for the Board seen in s. 2, and being mindful of the history of rate setting to date in giving efficacy to the promotion of the legislative purpose.

62 We also find that that interpretation is appropriate taking into account the criteria articulated in *Driedger*, above, namely it complies with the legislative text, it promotes the legislative purpose and the outcome is reasonable and just.

63 As indicated above, a statutory administrative tribunal obtains its jurisdiction from explicit powers or implicit powers. Having found that the jurisdiction to consider ability to pay in rate setting is explicitly within the *Act*, we need not consider the doctrine of necessary implication or the related principle of implied exclusion.

### **The issue of the Canadian Charter of Rights and Freedoms**

64 Before concluding, it is appropriate to mention the submission made on behalf of LIEN in respect of s. 15 (1) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), c. 11 (the "*Charter*").

65 LIEN says it raises the *Charter* simply within the context of it being an interpretive tool in discerning the meaning of an asserted ambiguous s. 36 of the *Act*. LIEN says it does not raise any issue that the *Act* or the Board's actions or inactions are contrary to the *Charter*.

66 LIEN argues that in the absence of clear statutory provisions, the requirement for "just and reasonable rates" must be interpreted to comply with s. 15. The *Charter* applies to provincial legislation and can be used as an interpretive tool. *R. v. Jackpine*, [2006] 1 S.C.R. 554, [2006] S.C.J. No. 15 (S.C.C.) at para. 18. In our view, as stated above, the *Act* provides the Board with the requisite jurisdiction without having to look to the *Charter*.

67 While we heard submissions from LIEN, we declined to hear from counsel for the respondents on this issue. We agree with our colleague Swinton J. that such an argument requires a full evidentiary record.

### Disposition

68 For the reasons given, the appeal is allowed and it is declared that the Board has the jurisdiction to establish a rate affordability assistance program for low income consumers purchasing the distribution of natural gas from the utility, EGD.

69 All parties agree that there is not to be any award of costs in respect of this appeal.

### Swinton J.:

70 The sole issue in this appeal is whether the Ontario Energy Board (the "Board") erred in holding that it had no jurisdiction, when setting residential rates for gas distribution, to order a rate affordability program for low income consumers. In my view, the majority of the Board was correct in concluding that the Board lacked jurisdiction to make such an order.

71 The majority of the Board predicated its decision on the understanding that the appellants' proposal contemplated the establishment of a rate group for low income residential consumers that would be funded by general rates. I, too, proceed on that assumption. While there were no details of a specific program put forth by the appellants during the hearing, it is inevitable that the Board, in setting lower rates for the economically disadvantaged, would have to impose higher rates on other consumers.

### The Board's Practice in Setting Rates

72 Pursuant to the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B (the "Act"), the Board has authority to set rates for both gas and electricity. It has traditionally set rates for gas through a "cost of service" assessment, in which it seeks to determine a utility's total cost of providing service to its customers over a one year period (the "test year"). According to the Board's factum, these costs include the rate base (which is essentially the net book value of the utility's total capital investments) and the utility's operational and maintenance costs for the test year, among other things. The utility's total costs for the test year (usually including a rate of return on the rate base portion) forms the revenue requirement. The revenue requirement is then divided amongst the utility's ratepayers on a rate class basis (that is, residential, small commercial, industrial, etc.).

73 With respect to gas, it has always been the Board's practice to allocate the revenue requirement to the different rate classes on the basis of how much of that cost the rate class actually causes ("cost causality"). To the greatest extent possible, the Board has striven to avoid inter-class subsidies (see, for example, Decision with Reasons, RP-2003-0063 (2005), p. 5).

### The Proper Approach to Statutory Interpretation

74 To determine the issue in this appeal, it is necessary to consider the powers conferred on the Board by its constituent legislation, the *Ontario Energy Board Act*. That Act must be interpreted using the modern principles of statutory interpretation described by Professor Ruth Sullivan in *Driedger on the Construction of Statutes* (3rd ed.) (Toronto: Butterworths, 1994) as follows:

There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions of special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of

(a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just. (at p. 131)

75 The words of a statute are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, its objects, and the intent of the Legislature (*ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140 (S.C.C.) at para. 37).

### The Words of the Provision in Issue

76 Subsection 36(2) of the Act gives the Board the broad authority to approve or fix "just and reasonable" rates for the distribution of gas. On its face, those words might encompass the power to set rates according to income. However, the words do not explicitly confer the power to do so, and the Supreme Court of Canada commented in *ATCO*, *supra* that a discretionary grant of authority to a tribunal cannot be viewed as conferring unlimited discretion. A regulatory tribunal must interpret its powers "within the confines of the statutory regime and principles generally applicable to regulatory matters, for which the legislature is assumed to have had regard in passing that legislation" (at para. 50).

77 The appellants also rely on s. 36(3), which states that in approving or fixing just and reasonable rates, the Board may adopt "any method or technique that it considers appropriate". These words were added to the Act in 1998. Examples of methods or techniques used by the Board for setting gas distribution rates are cost of service regulation and incentive regulation.

78 On its face, the words of s. 36(3) do not confer the jurisdiction to provide special rates for low income customers. The subsection replaced an earlier provision of the Act which required a traditional cost of service analysis in setting rates. I agree with the conclusion of the Board majority as to the meaning of s. 36(3) (Reasons, p. 10):

It gives the Board the flexibility to employ other methods of ratemaking in fixing just and reasonable rates, such as incentive ratemaking, rather than the traditional costs of service regulation specified in section 19 of the old Act. The change in the legislation was coincident with the addition of the regulation of the electricity sector to the Board's mandate. The granting of the authority to use methods other than cost of service to set rates for the gas sector was an alignment with the non-prescriptive authority to set rates for the electricity sector. The Board is of the view that if the intent of the legislature by the new language was to include ratemaking considering income level as a rate class determinant, the new Act would have made this provision explicit given the opportunity at the time of the update of the Act and the resultant departure from the Board's past practice.

### The Regulatory Context

79 According to longstanding principles governing public utilities developed under the common law, a public utility like the respondent Enbridge Gas Distribution Inc. ("Enbridge") must treat all its customers equally with respect to the rates they pay for a particular service (*Canada (Attorney General) v. Toronto (City)* (1893), 23 S.C.R. 514 (S.C.C.) at 519 -20; *St. Lawrence Rendering Co. v. Cornwall (City)*, [1951] O.R. 669 (Ont. H.C.) at 683; *Chastain v. British Columbia Hydro & Power Authority* (1972), 32 D.L.R. (3d) 443 (B.C. S.C.) at 454 ).

80 As noted in the Board's majority reasons, the Board is, at its core, an economic regulator (Reasons, p. 4). Rate setting is at the core of its jurisdiction (*Garland v. Consumers' Gas Co.* (2000), 185 D.L.R. (4th) 536 (Ont. S.C.J.) at para. 45). I agree with the majority's description of economic regulation as being "rooted in the achievement of economic efficiencies, the establishment of fair returns for natural monopolies and the development of appropriate cost allocation methodologies" (Reasons, p. 4).

81 Historically, in setting rates, the Board has engaged in a balancing of the interests of the regulated utility and consumers. The Board has not historically balanced the interests of different groups of consumers. As the Divisional Court stated in *Union Gas Ltd. v. Ontario (Energy Board)* (1983), 43 O.R. (2d) 489 (Ont. Div. Ct.) at p. 11:

... it is the function of the O.E.B. to balance the interest of the appellant in earning the highest possible return on the operation of its enterprise (a monopoly) with the conflicting interest of its customers to be served as cheaply as possible.

See, as well, *Edmonton (City) v. Northwestern Utilities Ltd.*, [1929] S.C.R. 186 (S.C.C.) at 192.

82 In a similar vein, the Supreme Court in *ATCO*, *supra* spoke of a "regulatory compact" which ensures that all customers have access to a utility at a fair price. The Court went on to state (at para. 63):

Under the regulatory compact, the regulated utilities are given exclusive rights to sell their services within a specified area at rates that will provide companies the opportunity to earn a fair rate of return for all their investors. In return for this right of exclusivity, utilities assume a duty to adequately and reliably serve all customers of their defined territories, and are required to have their rates and certain operations regulated...

The Court described the object of the Act "to protect both the customer *and* the investor" (at para. 64).

83 The Legislature, in conferring power on the Board, must be taken to have had regard to the principles generally applicable to rate regulation (*ATCO*, *supra* at paras. 50 and 64). I agree with the submission of Enbridge that those principles are the following:

(a) customers of a public utility must be treated equally insofar as the rate for a particular service or class of services is concerned; and

(b) the Legislature will be presumed not to have intended to authorize discrimination among customers of a public utility unless it has used specific words to express this intention.

84 Thus, the considerations of justice and reasonableness in the setting of rates have been and are those between the utility and consumers as a group, not among different groups of consumers based on their ability to pay.

#### **Other Provisions of the Act**

85 In applying s. 36(2), the Board must be bound by the objectives set out in s. 2 of the Act, which includes

2. To protect the interests of consumers with respect to prices and the reliability and quality of gas service.

86 The appellants submit that these words are broad enough to permit the Board to order a rate affordability assistance program. However, that is not obvious from the words used, which refer to "consumers" as a whole, and not to any particular subset of consumers. Indeed, it can be argued that any low income rate affordability program would run counter to the stated objective, given that such a program must almost certainly be funded through higher rates paid by other consumers. The result would be to provide benefits to one group of consumers at the expense of others.

87 The reason for this conclusion lies in the Board's historical approach to rate setting, as described earlier in these reasons. The Board sets a revenue requirement for utilities before allocating those costs to the different rate classes. The only way the utility could recover its revenue requirement, given a rate class with lower rates for low income consumers, would be to increase the rates charged to other classes. Therefore, such higher prices can not be seen as protecting the interests of consumers with respect to prices, as set out in objective 2.

88 Moreover, the Act contains an explicit provision in s. 79 that allows the Board to provide rate protection for rural and remote customers of electricity distributors. Subsection 79(1) provides:

The Board, in approving just and reasonable rates for a distributor who delivers electricity to rural or remote consumers, shall provide rate protection for those consumers or prescribed classes of those consumers by reducing the rates that would otherwise apply in accordance with the prescribed rules.

Section 79 also provides grandfathering for those who had a subsidy prior to the change in the Act. As well, it explicitly allows the distributor to be compensated for the subsidized rates through contributions from other consumers, as provided by the regulations.

89 This section was added to the Act in 1998, when the Board was given the authority over electricity rate regulation. Section 79 ensured the ongoing protection of rural rates put in place when electricity distribution was regulated by Ontario Hydro.

90 One of the principles of statutory interpretation is "implied exclusion". As Professor Sullivan has stated, this principle operates "whenever there is reason to believe that if the legislature had meant to include a particular thing within its legislation, it would have referred to that thing expressly" (*supra*, p. 186). While the purpose of s. 79 of the Act was to protect a pre-existing policy to assist rural and remote residential consumers, nevertheless, it is telling that there is no similar explicit power to order special rates or rate subsidies for other groups elsewhere in the Act.

### **The Significance of Ordering Rate Affordability Programs**

91 An appropriate interpretation can be justified in terms of its promotion of the legislative purpose and the reasonableness of the outcome (see Sullivan, quoted above at para. 5).

92 The ability to order a rate affordability program would significantly change the role that the Board has played — indeed, the majority of the Board stated a number of times that the proposal to base rates on income level would be a "fundamental" departure from its current practice. In the past, the Board has acted as an economic regulator, balancing the interests of the utility and its shareholders against the interests of consumers as a group. Were it to assume jurisdiction over rate affordability programs, it would carry out an entirely different function. It would enter into the realm of social policy, weighing the interests of low income consumers against those of other consumers. This is not a role that the Board has traditionally played. This is not where its expertise lies, nor is it well-suited to taking on such a role.

93 An examination of the particular case before the Board illustrates this. The appellants seek a rate affordability assistance program for gas in response to Enbridge's application for a rate increase for gas distribution — that is, for the *delivery* of natural gas. Customers can make arrangements for the purchase of the commodity of natural gas with a variety of suppliers in the competitive market. Therefore, were the Board to assume jurisdiction to order a rate affordability assistance program here, it could address only one part of the problem that low income consumers face in meeting their heating costs — the cost of distribution of gas.

94 In addition, the Board would have to consider eligibility criteria for a rate affordability assistance program that reasonably would take into account existing programs for assistance to low income consumers. Obviously, this would include social assistance programs. As well, Enbridge, in its factum, has identified other programs which provide assistance for low income consumers. For example, the Ontario government has implemented a program to assist low income customers with rising electricity costs through amendments to income tax legislation (*Income Tax Act*, R.S.O. 1990, c. I.2, s. 8.6.1, as amended S.O. 2006, c.18, c.1). At the federal level, there was one-time relief for low income families and senior citizens provided by the *Energy Costs Assistance Measures Act*, S.C. 2005, c. 49.

95 Moreover, in order to cover the lower costs, the Board would have to increase the rates of other customers in a manner that would inevitably be regressive in nature, as it is difficult to conceive how the Board would be able to determine, in a systematic way, the ability of these other customers to pay.

96 Clearly, the determination of the need for a subsidy for low income consumers is better made by the Legislature. That body has the ability to consider the full range of existing programs, as well as a wide range of funding options, while the Board

is necessarily limited to allocating the cost to other consumers. The relative advantages of a legislative body in establishing social programs of the kind proposed are well described in the following excerpt from a decision of the Oregon Public Utility Commissioner *Rate Concessions to Poor Persons & Senior Citizens, Re*, 14 P.U.R. 4th 87 (U.S. Or. P.U.C. 1976) at p. 94):

Utility bills are not poor persons' only problems. They also cannot afford adequate shelter, transportation, clothing or food. The legislative assembly is the only agency which can provide comprehensive assistance, and can fund such assistance from the general tax funds. It has the information and responsibility to deal with such matters, and can do so from an overall perspective. It can determine the needs of various groups and compare those needs to existing social programs. If it determines a special program is needed to deal with energy costs, it can affect all energy sources rather than only those the commissioner regulates.

With clear authority to establish social welfare policy, the legislative assembly also can monitor all state and federal welfare programs and the sources and extent of aid given to different groups. Without such overview, as independent agencies aid various segments of society, the total aid given each group is unknown, and unequal treatment of different groups becomes likely.

97 Where the issue of rate affordability programs has arisen in other jurisdictions, courts and boards have ruled that a public utilities board does not have jurisdiction to set rates based on ability to pay (see, for example, *Washington Gas Light Co. v. Public Service Commission of the District of Columbia*, 450 A.2d 1187 (U.S. D.C. Ct. App. 1982) at para. 38; *Dalhousie Legal Aid Service v. Nova Scotia Power Inc.* (2006), 268 D.L.R. (4th) 408 (N.S. C.A.) at 419 ; Alberta Energy and Utilities Board Decision 2004-066 [*ENMAX Power Corp., Re*, 2004 CarswellAlta 2078 (Alta. E.U.B.)], Section 9.2.6 at 161, as well as the Oregon case, *supra*).

98 The appellants distinguish the *Dalhousie* case because the Nova Scotia legislation is different from Ontario's. Specifically, s. 67(1) of the *Public Utilities Act*, R.S.N.S. 1989, c. 380 provides that "[a]ll tolls, rates and charges shall always, under substantially similar circumstances and conditions in respect of service of the same description, be charged equally to all persons and at the same rate".

99 While the language of the two statutes does differ, nevertheless, the reasons of the Nova Scotia Court of Appeal make it clear that the Board's role is not to set social policy. At para. 33, Fichaud J.A, observed, "The Board's regulatory power is a proxy for competition, not an instrument of social policy."

100 Moreover, the principle in s. 67(1) of the Nova Scotia Act requiring that rates be charged equally is a codification of the common law, set out earlier in these reasons. The Ontario Board has long operated according to the same principles.

101 The appellants submit that the recent decision in *Allstream Corp. v. Bell Canada*, [2005] F.C.J. No. 1237 (F.C.A.) assists their case. There, the Federal Court of Appeal upheld a decision of the Canadian Radio-Television and Telecommunications Commission (the "CRTC") approving special facilities tariffs submitted by Bell for the provision of optical fibre services pursuant to certain customer-specific arrangements. All but one related to a Quebec government initiative aimed at supporting the construction of broadband networks for rural municipalities, school boards and other institutions. The Court determined that the Commission's decision approving the tariffs was not patently unreasonable, given the exceptional circumstances of the case that justified a deviation from the normal practice of rate determination. The Court noted that the Commission considered matters that were not purely economic, but noted that such considerations were part of the Commission's wide mandate under s. 7 of the *Telecommunications Act*, S.C. 1993, c. 38 (at paras. 34-35).

102 Section 7 of that Act, unlike s. 2 of the *Ontario Energy Board Act*, expressly includes the power "to respond to the economic and social requirements of users of telecommunications services" (s. 7(h)), as well as to enrich and strengthen the social and economic fabric of Canada and its regions (s. 7(a)). Moreover, while s. 27(2)(b) of that Act forbids unjust discrimination in rates charged, s. 27(6) explicitly permits reduced rates, with the approval of the Commission, for any charitable organization or disadvantaged person.

103 In contrast to the broad mandate given to the CRTC, the objectives of the Board are much more confined. When the Board's objectives go beyond the economic realm, specific reference has been made to other objectives, such as conservation and consumer education (s. 2 (5) and (6)). There is no reference to the consideration of economic and social requirements of consumers.

104 The appellants have also pointed out that the Board has in the past authorized programs that transfer benefits to lower income customers. The Winter Warmth program is one in which individuals can apply for emergency financial relief with heating bills. It is triggered by an application from a particular customer, and the program is funded by all customers. The fact that the Board has approved this charitable program does not lead to the conclusion that it has jurisdiction to set rates on the basis of income level.

105 With respect to the Demand Side Management (DSM) programs, the majority of the Board explained that this is not equivalent to a rate class based on income level. At p. 11 of its Reasons, the majority stated,

The Board is vigilant in ensuring that customer groups are afforded the opportunity to receive the benefits of the costs charged. In the case of Demand Side Management (DSM) programs, for example, the Board has ordered that specific funding be channeled for programs aimed at low income customers. It cannot be argued that this constitutes discriminatory pricing. Rather, the contrary. It is an attempt to avoid discrimination against low income customers who also pay for DSM programs but may not have equal opportunities to take advantage of these programs.

106 Were the Board to assume jurisdiction to order a rate affordability assistance program, it would be taking on a significant new role as a regulator of social policy. Given the dramatic change in the role that it has historically played, as well as the departure from common law principles, it would require express language from the Legislature to confer such jurisdiction

#### **Jurisdiction by Necessary Implication**

107 In order to impute jurisdiction to a regulatory body, there must be evidence that the exercise of the power in question is a practical necessity for the regulatory body to accomplish the goals prescribed by the Legislature (*ATCO, supra* at paras. 51, 77). In this case, there is no evidence that the power to implement a rate affordability assistance program is a practical necessity for the Board to meet its objectives as set out in s. 2.

#### **The Role of the Charter**

108 The appellants submit that the values found in s. 15 of the *Canadian Charter of Rights and Freedoms* should be considered in the interpretation of the ratemaking provisions of the Act. However, the Charter has no relevance in interpretation unless there is genuine ambiguity in the statutory provision (*R. v. Jackpine*, [2006] 1 S.C.R. 554 (S.C.C.) at paras. 18-19). A genuine ambiguity is one in which there are "two or more plausible readings, each equally in accordance with the intentions of the statute" (at para. 18).

109 In my view, there is no ambiguity in the interpretation of s. 36 of the Act, and therefore, there is no need to resort to the Charter.

110 In any event, the appellants' argument is, in fact, that the failure of the Board to order a rate affordability program is discriminatory on the basis of sex, race, age, disability and social assistance, because of the adverse impact on these groups (*Factum*, para. 43, as well as para. 47). Such an argument can not be made without a full evidentiary record, and the inclusion of statistical material in the Appeal Book is not a sufficient basis on which to address this equality argument.

#### **Conclusion**

111 For these reasons, I am of the view that the majority decision of the Board was correct, and that the Board has no jurisdiction to order rate affordability assistance programs for low income consumers. Therefore, I would dismiss the appeal.

*Appeal allowed.*



2010 ONCA 284  
Ontario Court of Appeal

Toronto Hydro-Electric System Ltd. v. Ontario (Energy Board)

2010 CarswellOnt 2353, 2010 ONCA 284, 187 A.C.W.S. (3d) 567, 261  
O.A.C. 306, 317 D.L.R. (4th) 247, 68 B.L.R. (4th) 159, 99 O.R. (3d) 481

**Toronto Hydro-Electric System Limited (Appellant / Respondent in Appeal) and Ontario Energy Board (Respondent / Appellant in Appeal)**

K. Feldman, S.E. Lang, J. MacFarland JJ.A.

Heard: October 9, 2009  
Judgment: April 20, 2010  
Docket: CA C49980

Proceedings: reversing *Toronto Hydro-Electric System Ltd. v. Ontario (Energy Board)* (2008), 93 O.R. (3d) 380, 2008 CarswellOnt 5372, 298 D.L.R. (4th) 231, 53 B.L.R. (4th) 48 (Ont. Div. Ct.)

Counsel: Glenn Zacher, Patrick G. Duffy for Appellant, Ontario Energy Board  
James D.G. Douglas, Morgana Kellythorne for Respondent, Toronto Hydro-Electric System Limited

Subject: Public; Corporate and Commercial; Civil Practice and Procedure

**Related Abridgment Classifications**

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

**Headnote**

**Public law --- Public utilities — Operation of utility — Rates — Approval**

T Ltd. was electricity distributor — Board made decision under s. 78 of Ontario Energy Board Act, 1998 requiring that dividend paid to city be approved by majority of T Ltd.'s independent directors — T Ltd.'s appeal from part of decision regarding jurisdiction was allowed — Determination set aside to extent that it required dividend be approved by independent directors of board — Trial judge found OEB protects interests of ratepayers, but in ways authorized by statute — Trial judge found no express power to dictate how dividends are declared by directors — Trial judge found core function of OEB is rate-setting, and imposing restrictions on dividends by directors was not necessary or essential to core function — Board appealed — Appeal allowed — True question of jurisdiction did not emerge — Legislative intent was that board could set electricity rates in subjective and open ended manner — Board was entitled to consider history of dividend payments — Board's reasons provided intelligible explanation for determination — Considerations for public monopolies are different from private entities — Board's concerns regarding payout when infrastructure needs were pending, and inter-affiliate relations were reasonable — Board's determination was within range of acceptable outcomes — Authority to approve dividends did not take power away from directors contrary to Business Corporations Act.

**Public law --- Public utilities — Regulatory boards — Practice and procedure — Statutory appeals — Grounds for appeal — Lack of jurisdiction**

T Ltd. was electricity distributor — Board made decision under s. 78 of Ontario Energy Board Act, 1998 requiring that dividend paid to city be approved by majority of T Ltd.'s independent directors — T Ltd.'s appeal from part of decision regarding jurisdiction was allowed — Determination set aside to extent that it required dividend be approved by independent directors of T board — Trial judge found OEB protects interests of ratepayers, but in ways authorized by statute — Trial judge found no express power to dictate how dividends are declared by directors — Trial judge found

core function of OEB is rate-setting, and imposing restrictions on dividends by directors was not necessary or essential to core function — Board appealed — Appeal allowed — True question of jurisdiction did not emerge — Legislative intent was that board could set electricity rates in subjective and open ended manner — Board was entitled to consider history of dividend payments — Board's reasons provided intelligible explanation for determination — Considerations for public monopolies are different from private entities — Board's concerns regarding payout when infrastructure needs were pending, and inter-affiliate relations were reasonable — Board's determination was within range of acceptable outcomes — Authority to approve dividends did not take power away from directors contrary to Business Corporations Act.

**Administrative law --- Standard of review — Reasonableness — Reasonableness simpliciter**

T Ltd. was electricity distributor — Board made decision under s. 78 of Ontario Energy Board Act, 1998 requiring that dividend paid to city be approved by majority of T Ltd.'s independent directors — T Ltd.'s appeal from part of decision regarding jurisdiction was allowed — Determination set aside to extent that it required dividend be approved by independent directors of T board — Trial judge found OEB protects interests of ratepayers, but in ways authorized by statute — Trial judge found no express power to dictate how dividends are declared by directors — Trial judge found core function of OEB is rate-setting, and imposing restrictions on dividends by directors was not necessary or essential to core function — Board appealed — Appeal allowed — Standard of review was reasonableness — Issue was one of mixed fact and law with policy considerations — Although corporate law principles were involved, regulator had duty to use expertise to apply principles within standard of its objectives — Board did not exceed authority.

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*Enbridge Gas Distribution Inc. v. Ontario (Energy Board)* (2005), 2005 CarswellOnt 39, 193 O.A.C. 180, 74 O.R. (3d) 147 (Ont. C.A.) — considered

*Khosa v. Canada (Minister of Citizenship & Immigration)* (2009), 82 Admin. L.R. (4th) 1, 2009 SCC 12, 2009 CarswellNat 434, 2009 CarswellNat 435, 304 D.L.R. (4th) 1, 77 Imm. L.R. (3d) 1, 385 N.R. 206, [2009] 1 S.C.R. 339 (S.C.C.) — considered

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**Statutes considered:**

*Alberta Energy and Utilities Board Act*, R.S.A. 2000, c. A-17

Generally — referred to

*Business Corporations Act*, R.S.O. 1990, c. B.16

Generally — referred to

s. 127(3)(d) — considered

*Electricity Act, 1998*, S.O. 1998, c. 15, Sched. A

s. 29 — considered

s. 142 — referred to

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Generally — referred to

Pt. IV — referred to

s. 1(1) — considered

s. 1(1) ¶ 1 — considered

s. 1(1) ¶ 2 — considered

s. 23(1) — considered

s. 36(3) — considered

s. 44(1) — considered

s. 78 — considered

s. 78(2) — considered

s. 78(3) — considered

s. 128(1) — considered

APPEAL by board from judgment reported at *Toronto Hydro-Electric System Ltd. v. Ontario (Energy Board)* (2008), 93 O.R. (3d) 380, 2008 CarswellOnt 5372, 298 D.L.R. (4th) 231, 53 B.L.R. (4th) 48 (Ont. Div. Ct.), allowing appeal by corporation regarding terms of dividend payments.

**J. MacFarland J.A.:**

1 This is an appeal with leave of this court from the order of the Divisional Court (Kiteley, Swinton JJ., Lederman J. dissenting) dated September 9, 2008. The court declared that the Ontario Energy Board exceeded its jurisdiction and erred in law when it imposed, as a condition in its rate decision for 2006, a duty on Toronto Hydro-Electric System Limited to obtain the approval of a majority of its independent directors before declaring any future dividends payable to its affiliates (the "condition").

**Overview**

2 Toronto Hydro-Electric System Limited ("THESL") is an electricity distributor licensed and regulated by the Ontario Energy Board ("OEB"). THESL is a wholly-owned subsidiary of Toronto Hydro Corporation ("THC"). All of the shares of THC are owned by the City of Toronto (the "City").

3 In 2004-2005, THC paid over \$116 million to the City in the form of dividends and interest payments. THC funded a significant part of these payments through substantial annual increases in dividends from THESL and by charging THESL an above-market rate of interest on an inter-company loan. At the time THESL made the payments it had not completed a capital plan for reinvestment in its aging infrastructure.

4 When THESL applied to the OEB for approval of its distribution rates to be effective May 2006, the OEB expressed concern about the level of dividend payments and the above-market rate of interest being paid by THESL. Evidence before the OEB disclosed that the City anticipated a significant shortfall in its 2006 operating budget; that the City regarded THC as "a revenue source in the 2006 operating budget"; and that the City demanded substantial increases in dividends from THC which, in turn, demanded increased dividends from THESL.

5 The OEB is the regulator of Ontario's electricity industry, and is statutorily mandated to "protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service." The OEB manages this mandate primarily by setting just and reasonable rates.

6 In its decision, the OEB disallowed as a regulatory expense any interest charges above market rates, and required a majority of THESL's independent directors to approve any future dividend payments. In reaching this decision, the OEB noted that if a utility like THESL was to pay all of its retained earnings to its shareholders, this could adversely affect its credit rating, which in turn could harm ratepayer interests by causing higher costs and degradation in services. THESL appealed this decision.

7 In the Divisional Court, THESL argued that the OEB had no jurisdiction to impose the condition it did, either by statute or at common law, and further that the imposition of such a condition represented an unwarranted and indeed unlawful restriction on the authority of the board of directors to declare a dividend.

8 The majority in the Divisional Court accepted THESL's position on both bases advanced, allowed the appeal and set aside the part of the OEB decision that imposed the condition.

9 The OEB argues that the majority of the Divisional Court panel failed to appreciate and distinguish the principles that govern regulated utilities like THESL, which operate as monopolies, from those that apply to private sector companies, which operate in a competitive market. The OEB submits that this distinction is critical because whereas the directors and officers of an unregulated company have a fiduciary obligation to act in the best interests of the company (which usually equates to the interests of the shareholders), a regulated utility must operate in a manner that balances the interests of the utility's shareholders against the interests of its ratepayers. If a utility fails to operate in this way, it is incumbent on the OEB to intervene in order to strike this balance and protect the interests of ratepayers.

10 For the reasons that follow I would allow the appeal, set aside the order of the Divisional Court and restore the part of the rate decision that imposed the condition.

11 The issue for this court is whether the OEB had the ability, as part of its 2006 rate decision, to require THESL to obtain the approval of a majority of its independent directors before declaring any dividends.

### Analysis

12 This court has held that the OEB is a highly specialized expert tribunal with broad authority to regulate the energy sector in Ontario and to balance competing interests: see *Natural Resource Gas Ltd. v. Ontario (Energy Board)* (2006), 214 O.A.C. 236 (Ont. C.A.), at para. 18.

13 The analysis must begin with the legislation that establishes the OEB and gives the OEB its powers. The OEB's objectives in respect of electricity are stated in s. 1 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sch. B (the "Act"):

#### Boards objectives, electricity

1.(1) The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:

1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.
2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.<sup>1</sup>

14 In short, the OEB is to balance the interests of ratepayers in terms of prices and service while at the same time ensuring a financially viable electricity industry that is both economically efficient and cost effective.

15 The *Electricity Act, 1998*, S.O. 1998, c. 15, Sch. A, requires a distributor of electricity to sell electricity to every person connected to the distributor's distribution system (s. 29). However, the distributor can only charge for the distribution of electricity in accordance with an order of the OEB. Section 78 of the Act provides in part:

78(2) No distributor shall charge for the distribution of electricity or for meeting its obligations under section 29 of the *Electricity Act, 1998* except in accordance with an order of the Board, which is not bound by the terms of any contract.

.....

(3) The Board may make orders approving or fixing just and reasonable rates for the transmitting or distributing of electricity and for the retailing of electricity in order to meet a distributor's obligations under section 29 of the *Electricity Act, 1998*.

16 In relation to its ability to make orders the Act provides:

23(1) The Board in making an order may impose such conditions as it considers proper, and an order may be general or particular in its application.

17 In order to determine the appropriate standard of review, the inquiry must begin with a consideration of the nature of the OEB's decision.

### ***I. Avoiding the "Jurisdiction" Trap***

18 In recent years administrative law has undergone a significant transformation. Ever since Dickson J. championed the notion of increased deference to specialized administrative tribunals in *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 (S.C.C.) ("*CUPE*"), courts have sought to avoid labelling matters as jurisdictional where such a label might lead to a more searching review of the administrative decision than is appropriate in the circumstances. In *New Brunswick (Board of Management) v. Dunsmuir*, [2008] 1 S.C.R. 190 (S.C.C.), Bastarache and LeBel JJ. underlined the importance of *CUPE* in this regard at para. 35:

Prior to *CUPE*, judicial review followed the "preliminary question doctrine", which inquired into whether a tribunal had erred in determining the scope of its jurisdiction. By simply branding an issue as "jurisdictional", courts could replace a decision of the tribunal with one they preferred, often at the expense of a legislative intention that the matter lie in the hands of the administrative tribunal. *CUPE* marked a significant turning point in the approach of courts to judicial review, most notably in Dickson J.'s warning that courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so" (p. 233). Dickson J.'s policy of judicial respect for administrative decision making marked the beginning of the modern era of Canadian administrative law.

19 Support for the *CUPE* conceptualization of jurisdiction is also found in the majority reasons of Abella J. in *VIA Rail Canada Inc. v. Canadian Transportation Agency*, [2007] 1 S.C.R. 650 (S.C.C.), at paras. 88-89:

The Federal Court of Appeal also concluded that the standard for reviewing the Agency's decision on the issue of whether an obstacle is undue, is patent unreasonableness. I agree. I do not, however, share the majority's view that VIA raised a preliminary, jurisdictional question falling outside the Agency's expertise that was, therefore, subject to a different standard of review. Applying such an approach has the capacity to unravel the essence of the decision and undermine the very characteristic of the Agency which entitles it to the highest level of deference from a court — its specialized expertise. It ignores Dickson J.'s caution in [*CUPE*] that courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so".

*If every provision of a tribunal's enabling legislation were treated as if it had jurisdictional consequences that permitted a court to substitute its own view of the correct interpretation, a tribunal's role would be effectively reduced to fact-finding. Judicial or appellate review will "be better informed by an appreciation of the views of the tribunal operating daily in the relevant field". Just as courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so", so should they also refrain from overlooking the expertise a tribunal may bring to the exercise of interpreting its enabling legislation and defining the scope of its statutory authority. [Emphasis added; citations omitted.]*

20 Genuine questions regarding the boundaries of administrative authority under statute do arise. Administrative bodies must be correct in answering these questions. It is crucial to distinguish, however, between these "true" matters of jurisdiction and the wider understanding of jurisdiction that Dickson J. rebuked in *CUPE*. This point was highlighted by Bastarache and LeBel JJ. in *Dunsmuir* at para. 59:

Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. We mention true questions of *vires* to distance ourselves from the extended definitions adopted before *CUPE*. It is important here to

take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. "*Jurisdiction*" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction. An example may be found in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485. In that case, the issue was whether the City of Calgary was authorized under the relevant municipal acts to enact bylaws limiting the number of taxi plate licences. That case involved the decision-making powers of a municipality and exemplifies a true question of jurisdiction or *vires*. These questions will be narrow. We reiterate the caution of Dickson J. in *CUPE* that reviewing judges must not brand as jurisdictional issues that are doubtfully so. [Emphasis added; citations omitted.]

21 David Phillip Jones and Anne S. de Villars offer a helpful analysis of the difference between the "narrow" and "wide" meaning of jurisdiction in their text, *Principles of Administrative Law*, 5<sup>th</sup> ed. (Toronto: Carswell, 2009) at pp. 140-41:

In its broadest sense, "jurisdiction" means the authority to do every aspect of an *intra vires* action. In a narrower sense, however, "jurisdiction" means the power to commence or embark on a particular type of activity. A defect in jurisdiction "in the narrow sense" is thus distinguished from other errors - such as a breach of a duty to be fair, considering irrelevant evidence, acting for an improper purpose, or reaching an unreasonable result - which take place *after* the delegate has lawfully started its activity, but which cause it to leave or exceed its jurisdiction.

.....

It is important to remember that virtually all grounds for judicial review of administrative action depend upon an attack on some aspect of the delegate's jurisdiction (in the wider sense) to do the particular activity in question. Consequently, it is equally important to remember that any behaviour which causes the delegate to *exceed* its jurisdiction is just as fatal as any error which means that it never had jurisdiction "in the narrow sense" even to commence the exercise of its jurisdiction. [Italics in original; footnotes omitted.]

22 Further guidance in terms of defining exactly what constitutes "true" questions of jurisdiction can be gleaned from the reasons of Abella J. in *VIA Rail*. At para. 91, she cited *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890 (S.C.C.), at para. 18, for the proposition that "[t]he test as to whether the provision in question is one that limits jurisdiction is: was the question which the provision raises one that was intended by legislators to be left to the exclusive decision of the Board?" In the same paragraph, Abella J. also referred to *Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. U.E.S., local 298*, [1988] 2 S.C.R. 1048 (S.C.C.), at p. 1087, where Beetz J. held that "the only question which should be asked [is], 'Did the legislator intend the question to be within the jurisdiction conferred on the tribunal?'"

23 Thus, the focus is on discerning legislative intent with respect to the scope of a tribunal's authority to undertake an inquiry. This reading is consistent with Bastarache and LeBel JJ.'s observation that "[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (*Dunsmuir* at para. 54), and Abella J.'s conclusion that "[a] tribunal with the power to decide questions of law is a tribunal with the power to decide questions involving the statutory interpretation of its enabling legislation" (*VIA Rail* at para. 92). It also accords with Jones and de Villars observation at p. 146:

[A] conscious and clearly-worded decision by the legislature to use a subjective or open-ended grant of power has the effect of widening the delegate's jurisdiction and, therefore, narrowing the ambit of judicial review of the legality of its actions.

24 Courts should hesitate to analyze the decisions of specialized tribunals through the lens of jurisdiction unless it is clear that the tribunal exceeded its statutory powers by entering into an area of inquiry outside of what the legislature intended. If the decision of a specialized tribunal aims to achieve a valid statutory purpose, and the enabling statute includes a broad

grant of open-ended power to achieve that purpose, the matter should be considered within the jurisdiction of the tribunal. Its substance may still be reviewed for other reasons - on either a reasonableness or correctness standard - but it does not engage a true question of jurisdiction and cannot be quashed on the basis that the tribunal could not "make the inquiry" or "embark on a particular type of activity". In contrast, where a tribunal is pursuing an illegitimate objective, or is engaging in actions that clearly defy the limits of its statutory authority, then a reviewing court may properly declare its decisions to be *ultra vires*. These principles are consistent with Abella J.'s reasoning in *VIA Rail* at para. 96:

It seems to me counterproductive for courts to parse and recharacterize aspects of a tribunal's core jurisdiction... in a way that undermines the deference that jurisdiction was conferred to protect. By attributing a jurisdiction-limiting label, such as "statutory interpretation" or "human rights", to what is in reality a function assigned and properly exercised under the enabling legislation, a tribunal's expertise is made to defer to a court's generalism rather than the other way around.

## ***II. Broad Powers of the OEB***

25 The case law suggests that the OEB's power in respect of setting rates is to be interpreted broadly and extends well beyond a strict construction of the task.

26 For example, in *Advocacy Centre for Tenants-Ontario v. Ontario Energy Board* (2008), 293 D.L.R. (4th) 684 (Ont. Div. Ct.), the majority of the court held that the OEB had the jurisdiction to establish a rate affordability assistance program for low-income consumers purchasing the distribution of natural gas from the utility. Section 36(3) of the Act states that "[i]n approving or fixing just and reasonable rates, the Board may adopt any method or technique it considers appropriate." In paras. 53-56, the majority noted the breadth of the OEB's rate-setting power when its actions were in furtherance of the statutory objectives:

[T]he Board is authorized to employ "any method or technique that it considers appropriate" to fix "just and reasonable rates."... the Board must determine what are "just and reasonable rates" within the context of the objectives set forth in s. 2 of the Act. Objective #2 therein speaks to protecting "the interests of consumers with respect to prices."

.....

[T]he Board in the consideration of its statutory objectives might consider it appropriate to use a specific "method or technique" in the implementation of its basic "cost of service" calculation to arrive at a final fixing of rates that are considered "just and reasonable rates." This could mean, for example, to further the objective of "energy conservation", the use of incentive rates or differential pricing dependent upon the quantity of energy consumed. As well, to further the objective of protecting "the interests of consumers" this could mean taking into account income levels in pricing to achieve the delivery of affordable energy to low income consumers on the basis that this meets the objective of protecting "the interests of consumers with respect to prices."

The Board is engaged in rate-setting within the context of the interpretation of its statute in a fair, large and liberal manner.

27 The jurisdiction of the OEB was also reviewed in *Enbridge Gas Distribution Inc. v. Ontario (Energy Board)* (2005), 74 O.R. (3d) 147 (Ont. C.A.). In *Enbridge*, the OEB issued a rule permitting the gas vendor to determine who will bill its customers for the gas they buy from a vendor and for its transportation to them by the distributor. The appellants argued that this rule went beyond the jurisdiction conferred on the OEB by s. 44(1) of the Act, which provides that the OEB may make rules "governing the conduct of a gas distributor as such conduct relates to [a gas vendor]". Goudge J.A. ultimately found that the OEB had the jurisdiction to issue the rule. He endorsed a broad understanding of the Act in paras. 27-28:

[The appellants] say that the intention of this subsection is to limit the Board's jurisdiction to a rule governing only the part of a gas distributor's conduct that relates to its business relationship with a gas vendor, such as when the gas vendor acts as agent on behalf of its gas supply customer to arrange with the gas distributor for delivery of that gas supply to that customer. ...

In my view, there is nothing in either the language of s. 44(1)(b) or its statutory context to suggest such a narrow interpretation. ... Moreover, such a narrow reading would be inconsistent with the broad purpose of the Act, which is to



regulate all aspects of the gas distribution business, not simply those aspects that involve a direct business relationship with gas vendors.

28 A recent decision from the Divisional Court offers further support for the proposition that the OEB enjoys a wide ambit of power in its rate-setting function. In *Toronto Hydro-Electric System Ltd. v. Ontario (Energy Board)* (2009), 252 O.A.C. 188 (Ont. Div. Ct.), leave to appeal to Ont. C.A. refused, the OEB allocated THESL's net after-tax gains on the sale of three properties to reduce THESL's revenue requirement, and thereby also reduce electricity distribution rates to ratepayers. The court unanimously held that the proper approach to a review of the OEB decision did not involve a "true" jurisdictional analysis as contemplated in *Dunsmuir*. Rather, a reasonableness standard applied because the decision in the case - whether and how the OEB may allocate the net after-tax gains on the sale of properties to reduce THESL's revenue requirement - was squarely within the rate-setting authority of the OEB and went to very core of the OEB's mandate. The court noted the expansive content of the rate-setting power at para. 17:

An OEB decision may well engage or impact principles of corporate law, given that it regulates incorporated distributors, but the nature of the issue must be viewed in light of the regulatory scheme. While the decision in this case may have the effect of curtailing the appellant's ability to otherwise distribute or invest the net after tax gains from the sale of the properties, the substance of the OEB's decision relates to whether and how to apply those gains in its rate setting formula. Unlike the cases relied upon, this issue directly relates to the OEB's determination of rates and goes to the heart of its regulatory authority and expertise. There is no dispute that the OEB has rate-setting powers under the *OEBA* which are broad enough to encompass the power to determine reduced revenue requirements as a result of the sale of non-surplus assets. Although there is no privative clause, the OEB is a highly specialized expert tribunal with broad authority to regulate the energy sector in Ontario and to balance competing interests. [Citations omitted.]

29 The present appeal does not engage a "true" question of jurisdiction. As confirmed above, the Act is to be interpreted broadly. It is clear that the legislative intent of s. 78 of the Act is that the OEB have the principal responsibility for setting electricity rates. The Act specifies that in carrying out its responsibilities the OEB *shall* be guided by the objectives in s. 1(1), which include protecting the interests of customers with respect to prices and the adequacy, reliability and quality of electricity service. The Act also permits the OEB in making an order, to impose such conditions as *it* considers proper, and states that these conditions may be general or particular in application (s. 23(1)). Thus, the legislation reflects a clear intent by legislators to use both a subjective and open-ended grant of power to enable the OEB to engage in the impugned inquiry in the course of rate setting.

30 Further, it is apparent that as part of its rate-setting function, the OEB was entitled to consider the history of THESL's dividend payments. This was part of the inquiry into whether and how to control outgoing cash flows from THESL in order to ensure adequate capital. This line of inquiry goes to the heart of the OEB achieving its statutory objectives. In its reasons, the OEB noted that at the hearing there was considerable discussion of the dividend issue and that information concerning the dividend payouts had been filed. An inquiry into dividend payments was an inquiry that all parties believed was within the OEB's jurisdiction. The "true" nature of the respondent's challenge cannot be characterized as a matter of jurisdiction. Of course, it does not follow that the methods chosen are insulated from review (see Part IV).

### **III. The ATCO Decision**

31 THESL argues that the Supreme Court of Canada's recent decision in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140 (S.C.C.), militates in favour of reviewing OEB decisions using a correctness standard. *ATCO* involved an application by ATCO to have the sale of a property approved by the Alberta Energy and Utilities Board as required by the statute. The Board approved the sale and imposed a condition requiring that a certain portion of the sale proceeds be allocated to rate-paying customers. The *Alberta Energy Board Utilities Act* set out that with respect to an order, the Board may "impose any additional conditions that the Board considers necessary in the public interest".

32 Writing on behalf of three other justices, Bastarache J. divided the inquiry into two questions. The first question was whether the Board had the power pursuant to its enabling statutes to allocate the proceeds from the sale of the utility's asset to

its customers when approving the sale. The second question was whether the Board was permitted to allocate the proceeds of the sale in the way that it did. Bastarache J. concluded that the first question was to be reviewed on a correctness standard and the second question was to be reviewed on a more deferential standard.

33 This case is distinguishable from *ATCO*. The statutory grant of power in *ATCO* to "impose any additional conditions that the Board considers necessary in the public interest" is different than the statutory grant of power in this case. Bastarache J. referred to this provision as vague, elastic, and open-ended. In the present case, the OEB's imposition of a condition it considers proper (s. 23(1)) has to be guided by the legislated objectives set out in s. 1(1). These objectives are not vague, elastic, and open-ended. To the extent that there is uncertainty with respect to the achievement of the s. 1(1) objectives, that is a matter undeniably within the expertise of the OEB. Further, unlike the *ATCO* provision, the objectives in the Act require that the OEB protect the interests of *both* the customer and the utility.

34 There are four other factors that support distinguishing *ATCO* from this case. First, the decision in *ATCO* reveals that Bastarache J. reasoned that *ATCO* was not a rate-setting case. He noted that the provision granting the power to impose conditions could not be read in isolation. Rather, he explained that the provision had to be considered within the context of the purpose and scheme of the legislation. Bastarache J. stated that the main purpose of the Board is rate setting. The allocation of the sale proceeds did not fit within the limits of the powers of the Board, which "are grounded in its main function of fixing just and reasonable rates ('rate setting') and in protecting the integrity and dependability of the supply system" (para. 7).

35 Second, at para. 30, Bastarache J. determined that the Board's protective role -safeguarding the public interest in the nature and quality of the service provided to the community by public utilities by ensuring that utility rates are always just and reasonable- did not come into play. This factor pointed to a less deferential standard of review. In the present case, the OEB's "protective role" was central to the dividend condition.

36 Third, Bastarache J., viewed the issue in *ATCO* as the Board's power to transfer proprietary rights in the assets of the utility to the customers. In this case, the dividend condition did not result in the transfer of proprietary rights.

37 Fourth, in giving examples of conditions that could attach to the approval of a sale, Bastarache J. stated at para. 77 that the Board "could also require as a condition that the utility reinvest part of the sale proceeds back into the company in order to maintain a modern operating system that achieves the optimal growth of the system." As will be explained, the OEB placed the condition on the payment of dividends to ensure that dividends would not be paid when there was insufficient capital for plant maintenance.

#### ***IV. Reviewing the Exercise of OEB Jurisdiction: The Reasonableness Standard***

38 Having determined that the OEB did not exceed its statutory grant of power, the question remains whether it could order that the declaration of a dividend requires the approval of the majority of THESL's independent directors. This question is reviewable on a reasonableness standard.

39 Recently, a reasonableness standard was used by this court in *Natural Resource Gas Ltd. v. Ontario (Energy Board)* (2006), 214 O.A.C. 236 (Ont. C.A.). The case arose from the application by a gas distributor seeking an order increasing its rate over a 12-month period, in order to allow for the recovery of unrecorded costs which were the result of an accounting error. Writing for the panel, Juriensz J.A. reviewed some of the recent appellate jurisprudence and concluded that reasonableness was the appropriate standard of review as the question was one of mixed fact and law, and also involved policy considerations:

In two recent decisions, *Graywood Investments Ltd. v. Toronto Hydro-Electric System*, [2006] O.J. No. 2030 (C.A.) and *Enbridge Gas Distribution Inc. v. Ontario (Energy Board)*, [2006] O.J. No. 1355 (C.A.), this court has considered the standard of review of decisions of the OEB.

In *Enbridge*, while the result did not turn on the standard of review, Doherty J.A. did note (at para. 17) that the OEB had advanced a "forceful argument that the standard of review should, at the highest, be one of reasonableness".

In *Graywood*, MacPherson J.A. recognized the expertise of the OEB in general (at para. 24):

First, the OEB is a specialized and expert tribunal dealing with a complicated and multifaceted industry. Its decisions are, therefore, entitled to substantial deference.

In order to take this case outside the application of this general conclusion, [the distributor] must establish that the nature of the question in dispute and the relative expertise of the OEB regarding that question are different in this case than in *Graywood*. [At paras. 7-10.]

.....

It is clear that the Act constitutes the OEB as a specialized expert tribunal with the broad authority to regulate the energy sector in Ontario. In carrying out its mandate, the OEB is required to balance a number of sometimes competing goals. On the one hand, it is required to protect consumers with respect to prices and the reliability and quality of gas service, but on the other hand, it is to facilitate a financially viable gas industry. The legislative intent is evident: the OEB is to have the primary responsibility for setting gas rates in the province.

The Act does not contain a privative clause. Section 33 provides a right of appeal to the Divisional Court from an order of the OEB "only upon a question of law or jurisdiction". [At paras. 18-19.]

.....

While the question does involve the meaning of the phrase "just and reasonable", it requires the application of that phrase to the particular and unusual facts of this case. The question is one of mixed fact and law and involves policy considerations as well. The OEB possesses greater expertise relative to the court in determining the question.

Consequently, I conclude that the OEB's decision is reviewable on a standard of reasonableness. [At paras. 23-24.]

40 The facts of this case do not warrant departure from the reasonableness analysis. In my view, the nature of the OEB decision - structuring a condition that will protect the long-term integrity of THESL's energy infrastructure - falls squarely within the category of "mixed fact and law" with "policy considerations".

41 One of the reasons given by the majority below for applying a correctness standard was because the case dealt with principles of corporate law. When dealing with a regulated corporation the fact that corporate law principles are at play does not alone suggest a correctness standard of review. Corporate law principles will often be engaged when making decisions in respect of regulated corporations. It is the regulator's duty to use its expertise to apply corporate law principles within the context of its objectives; this implies a reasonableness standard.

#### ***V. Is the Decision a Reasonable One?***

42 At para. 47 of *Dunsmuir*, Bastarache and LeBel JJ. described the two inquiries involved in assessing the reasonableness of a decision:

Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. *In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.*

[Emphasis added.]

43 The first inquiry of the reasonableness analysis is into the "existence of justification, transparency and intelligibility within the decision-making process." The second inquiry is "concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of facts and law." Thus, the first inquiry deals with the justification process as articulated in the reasons for the decision and the second inquiry looks at the outcome. As noted in *Dunsmuir*, the reasonableness analysis will concern mostly the first inquiry.

(a) *Justification, transparency and intelligibility*

44 The inquiry into the justification, transparency and intelligibility of the decision-making process is focused on the reasons for the decision. In an oft-cited passage from *Ryan v. Law Society (New Brunswick)*, [2003] 1 S.C.R. 247 (S.C.C.), Iacobucci J. at para. 55 articulated the relationship between the reasons of a tribunal and the ultimate reasonableness of its decision:

A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere. *This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling.* [Emphasis added; citations omitted.]

45 Further, as Abella J. explained in *Via Rail* at para. 104:

Where an expert and specialized tribunal has charted an appropriate analytical course for itself, with reasons that serve as a rational guide, reviewing courts should not lightly interfere with its interpretation and application of its enabling legislation.

46 And as more recently noted by Binnie J. in *Khosa v. Canada (Minister of Citizenship & Immigration)*, [2009] 1 S.C.R. 339 (S.C.C.), at para. 59:

Reasonableness is a single standard that take its colour from the context. ... [A]s long as the process and the outcome fit comfortably within the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.

and at para. 63:

*Dunsmuir* thus reinforces in the context of adjudicative tribunals the importance of reasons, which constitute the primary form of accountability of the decision-maker to the applicant, to the public and to a reviewing court.

47 The OEB's reasons provide an intelligible explanation for the condition. The reasons both disclose a concern relating to "prices and the adequacy, reliability and quality" of service and explain how the chosen remedy will help to alleviate this concern.

48 Before addressing these two elements, it is important to note one factor about the context of the decision. THESL is what has been described as a "regulated monopoly". As Bastarache J. explained in *ATCO* at para. 3, "utility regulations exist to protect the public from monopolistic behaviour and the consequent inelasticity of demand while ensuring the continued quality of an essential service". In other words, the OEB's regulatory power is designed to act as a proxy in the public interest for competition: see *Advocacy Centre for Tenants-Ontario*. Because there is no competition, THESL could easily pass on the expense of business decisions to ratepayers through increased utility prices, or through the degradation of the quality of service, without the usual risk of losing customers. As was explained in para. 39 of *Advocacy Centre for Tenants-Ontario*, "[t]he Board's mandate through economic regulation is directed primarily at avoiding the potential problem of excessive prices resulting because of a monopoly distributor of an essential service."

49 While THESL is incorporated, as is required by s. 142 of the *Electricity Act*, under the provisions of the *Business Corporation Act*, R.S.O. 1990, c. B.16, ("*OBCA*") it is publicly regulated rather than a private corporation. This distinction is an important one. As Lederman J. noted in his dissenting reasons in the court below at para. 78:

At the heart of a regulator's rate-making authority lies the "regulatory compact" which involves balancing the interests of investors and consumers. In this regard, there is an important distinction between private corporations and publicly regulated corporations. With respect to the latter, in order to achieve the "regulatory compact", it is not unusual to have constraints imposed on utilities that may place some restrictions on the board of directors. That is so because the directors of utility companies have an obligation not only to the company, but to the public at large.

50 The principles that govern a regulated utility that operates as a monopoly differ from those that apply to private sector companies, which operate in a competitive market. The directors and officers of unregulated companies have a fiduciary obligation to act in the best interests of the company (which is often interpreted to mean in the best interests of the shareholders) while a regulated utility must operate in a manner that balances the interests of the utility's shareholders against those of its ratepayers. If a utility fails to operate in this way, it is incumbent on the OEB to intervene in order to strike this balance and protect the interests of the ratepayers.

51 The decision reveals that the OEB was concerned about the aging plant and the lack of necessary capital. At the hearing it was argued that there appeared to be underinvestment in the physical plant over the past several years (para. 4.4.1). Evidence was presented that 30 to 40 per cent of the plant in service had exceeded its expected life (para. 4.5.3). The Board concluded that increased capital spending was required to address the issues of the aging plant (para. 4.7.1) and to maintain system reliability (para. 4.10.8).

52 However, despite the need for capital, the evidence was that there was a very dramatic increase in the dividend payouts in 2004 and 2005. As the OEB noted at para. 6.4.1, "[t]he level of dividends appears to be greater than the net income of the utility over at least a two year period." At para. 6.4.4 the OEB explained why these events were of concern:

The question arises as to whether the Board should restrict the dividend payout by the utility. To the extent a utility pays all of its retained earnings to the shareholder, it will become more dependent on borrowing and this may have an adverse effect on its credit rating.

53 In sum, the OEB was concerned because THESL was paying THC very large dividends even though increased capital spending was going to be needed to maintain system reliability. THESL was either going to ignore its aging infrastructure or have to borrow funds to address it. Both courses of conduct would ultimately, as the OEB explained, have adverse effects on ratepayers. Lederman J. effectively summarized these circumstances at paras. 80 and 85:

The setting of rates will accomplish little in terms of public protection if the revenue can be stripped out of the company without any controls.

.....

The OEB had evidence before it that THESL was paying increased dividends and an above market rate of interest while it was under investing by about \$60 million in its capital expenditures. The OEB noted that if a utility like THESL was to pay all its retained earnings to its shareholder, this could adversely impact its credit rating, which in turn, could cause higher costs and degradation in service to electricity consumers.

54 The OEB also explained how it reached the conclusion that an appropriate response to the concerns raised by the substantial dividend payouts, was to require that any dividend paid by THESL be approved by a majority of its independent directors.

55 At the time of the hearing, the composition of the board of directors of THESL was identical to the THC. The reasons reveal that the OEB was very concerned about the about the relationships between THESL, THC, and the City. For example, at para. 3.2.3 the OEB questioned the percentage of THC's costs recovered from THESL:

It is readily apparent to the Board that allocating these costs based on gross revenues produces an unwarranted bias against the ratepayers. The revenues of the utility are inflated by the high cost of wholesale power. That is an ever increasing amount. Because these costs are increasing, it does not follow the utility's share of the overhead costs should be increasing. In short, there is no necessary relationship between the revenue share and the share of overhead cost.

56 The reasons also discuss the above-market interest rate THESL was paying the THC on a loan (s. 5.3), as well as the purchase of the City's street lighting business (para. 6.4.3). According to the OEB, the above-market interest rate resulted in THESL paying approximately an additional \$16 million per year which was being borne by the ratepayers. Amplifying the concern was the City's decision after the hearing, but before the decision was released, to extend the loan to 2013. This led the OEB to note at para. 5.3.8, it is "apparent that the financing decisions are being made unilaterally by the City, which is the sole shareholder of the utility."

57 With respect to dividends, as already noted, the OEB was concerned about the very dramatic increase in the dividend payouts in 2004 and 2005. At para. 5.3.18 the OEB stated:

*Nor is it any defence to say this is not a decision of the utility but is being made unilaterally by the City of Toronto. That is exactly the problem. In fact it could be argued that this is part of a pattern. The City has extracted extensive dividends from this utility in recent years. It is likely one of the rare occurrences in Canadian financial markets where the level of dividends exceeds the net income. [Emphasis added.]*

58 Moreover, the OEB was aware of a change in a shareholder direction and the payment of special dividends. These facts are referred to in para. 6.4.2:

At one time, there was a shareholder direction that limited the dividend payout to 40% of the utility's income, but that was changed to 50% of consolidated income. Moreover, it appears that were special dividends over and above that amount.

59 Thus, the OEB was of the opinion that one of the reasons for the THESL's unusual dividend payouts was the THC's, and ultimately the City's, control over THESL's decision making. The OEB explained at paras. 6.4.5 and 6.4.6 of the decision:

A related question is the independence of the directors. The evidence in the hearing is that the directors of the utility and the parent, Toronto Hydro Corporation are currently identical.

And none of the members of management are to be on the Board. This is an unusual situation.

There is a requirement that at least one third of the directors of the distributor must be independent but that rule will not apply to this utility until July 1, 2006. In the course of these hearings the utility has confirmed that it will comply with the requirement and at that time, the independent directors will be appointed.

60 Concern about affiliate transactions is not unique to THESL. The decision notes that there is extensive jurisprudence in gas cases with respect to transactions between a regulated utility and an affiliate (para. 5.3.17). The OEB has also established the *Affiliate Relationship Code for Electricity Distributors and Transmitters* ("ARC") with a separate compliance procedure to guard against harm to ratepayers that may arise as a result of dealings between a utility and its affiliates. One of the provisions of the ARC required that one third of the board of directors of a distributor be independent from any affiliate by July 1, 2006. It is evident that independence is viewed as a guard against harmful decisions that arise as a result of dealings between a utility and its affiliates.

61 Following this line of reasoning, the Board concluded at paras. 6.4.7 to 6.4.9 that the condition was needed to balance the interests of *both* the customer and the shareholder:

Given the unusual high level of dividend payout and the concern expressed by a number of parties, the Board believes that it is appropriate that any dividend paid by the utility to the City of Toronto should be approved by a majority of the independent directors.

Much of the controversy in this case has been dominated by discussion about non arms length transaction between the utility and the City of Toronto, whether it relates to dividend payouts, payment of interest on loans or the purchase of goods and services. *The introduction of independent directors will be a step in the right direction. The requirement that independent directors approve dividend payouts to affiliates will give the public greater assurance that the interests of ratepayers are not subservient to those of the shareholders.* The Board believes this is in keeping with the policy intent of Section 2 of the ARC.

This provision will be reviewed by the Board in the next rate case. At a minimum it will signal the Board's serious concern with the state of inter-affiliate relations. [Emphasis added.]

62 For the reasons set out above, this was a reasonable decision.

*(b) Acceptable Outcomes*

63 To reiterate, the second inquiry in a reasonableness analysis is that the decision fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." It is in this part of the analysis where, in my opinion, this court should address THESL's argument that the imposed condition violated corporate law.

64 THESL argued at the Divisional Court, and argues before this court, that the OEB order was contrary to settled principles of corporate law that the directors of a public company cannot delegate their power to declare dividends. Section 127(3)(d) of the *OBCA* confirms this prohibition by expressly excluding any delegation of the board of directors' power to declare a dividend from the general rule permitting delegation to a managing director or committee of directors.

65 The OEB submits that the authority to approve dividends was not taken away from the directors. Approval by the entire board is still required before a dividend can be issued. The independent directors are simply an additional check on the authority of the full board. The OEB also relies on s. 128(1) of the Act which provides that, "[i]n the event of a conflict between this Act and any other general or special act, this Act prevails."

66 The majority judgment below accepted THESL's argument, and found that the OEB had effectively delegated the power to declare dividends to the majority of the independent directors contrary to the *OBCA* and long-standing corporate law principles.

67 In dissenting reasons, Lederman J. accepted the submission of the OEB - that the order leaves the discretion to declare a dividend in the hands of THESL's directors, albeit with an additional check by THESL's independent directors.

68 In the context of a regulated corporation, I agree with Lederman J. As he explained at para. 81, "the OEB has crafted a reasonable and less intrusive remedy that balances the interests of THESL's shareholder and its ratepayers and is consistent with the 'regulatory compact'."

**Conclusion**

69 For these reasons, I would allow the appeal, set aside the order of the Divisional Court and in its place make an order in accordance with these reasons. In the circumstances, I would not order costs.

***K. Feldman J.A.:***

I agree.

***S.E. Lang J.A.:***

I agree.

*Appeal allowed.*

Footnotes

1 On September 9, 2009, three additional objectives were added to s. 1(1).

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**H** Dalhousie Legal Aid Service v. Nova Scotia Power Inc.  
 2006 NSCA 74, 2006 CarswellNS 249 Nova Scotia Court of Appeal Nova Scotia June 20, 2006 (Approx. 16 pages)

2006 CarswellNS 249, 2006 NSCA 74, [2006] N.S.J. No. 243, 149 A.C.W.S. (3d) 355, 245 N.S.R. (2d) 206,  
 268 D.L.R. (4th) 408, 777 A.P.R. 206

**Dalhousie Legal Aid Service (Appellant) v. Nova Scotia Power Inc.  
 (Respondent)**

 Original Go to

Heard: May 29, 2006  
 Judgment: June 20, 2006  
 Docket: C.A. 248695

Counsel: Claire McNeil, Vincent Calderhead for Appellant  
 Daniel Campbell, Q.C. for Respondent  
 Richard Melanson for Nova Scotia Utility & Review Board  
 Stephen McGrath for Attorney General of Nova Scotia

Subject: Public; Civil Practice and Procedure

## RELATED RESOURCES

Canadian Guide to Uniform Legal

Abridgment digests and classifications  
 for all levels of this case

**Related Abridgment Classifications**

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

**Headnote**

**Public law --- Public utilities — Regulatory boards — Practice and procedure — Judicial review  
 — Jurisdiction of board**

Power corporation served nearly half million customers in province — Corporation applied to board to institute rate increases — Intervenor requested board approve program featuring power rate credits for low income customers — Board concluded that it had no power to consider intervenor's proposal and declined to consider plan — Intervenor brought appeal from board's decision — Appeal dismissed — Board did not err in refusing to consider merits of plan — Board's regulatory power was proxy for competition, not instrument of social policy — Legislation mandated that rates were always to be charged equally to all persons in substantially similar circumstances and conditions — Board could not reduce rates to low income customers who received same service as high income customers — Previous decisions where board approved load retention rates for large industrial customers were not relevant to current proceedings — Such decisions dealt with distinct economic realities of demand and competition which were legitimately within board's purview.

**Table of Authorities****Cases considered by *Fichaud J.A.*:**

*Allstream Corp. v. Bell Canada* (2005), 2005 FCA 247, 2005 CarswellNat 1970, 338 N.R. 177, 2005 CAF 247, 2005 CarswellNat 5049 (F.C.A.) — considered

*ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)* (2006), 2006 SCC 4, 2006 CarswellAlta 139, 2006 CarswellAlta 140, 344 N.R. 293, 54 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 1, 263 D.L.R. (4th) 193, 39 Admin. L.R. (4th) 159 (S.C.C.) — followed

*Baker v. Canada (Minister of Citizenship & Immigration)* (1999), 174 D.L.R. (4th) 193, 1999 CarswellNat 1124, 1999 CarswellNat 1125, 243 N.R. 22, 1 Imm. L.R. (3d) 1, 14 Admin. L.R. (3d) 173, [1999] 2 S.C.R. 817 (S.C.C.) — referred to

*Bell ExpressVu Ltd. Partnership v. Rex* (2002), 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 100 B.C.L.R. (3d) 1, [2002] 5 W.W.R. 1, 212 D.L.R. (4th) 1, 287 N.R. 248, 18 C.P.R. (4th) 289, 166 B.C.A.C. 1, 271 W.A.C. 1, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559 (S.C.C.) — considered

*Capital District Health Authority v. N.S.G.E.U.* (2006), 2006 NSCA 44, 2006 CarswellNS 154 (N.S. C.A.) — considered

*Doctors Nova Scotia v. Nova Scotia (Department of Health)* (2006), 2006 NSCA 59, 2006

*Baker v. Canada (Minister of Citizenship & Immigration)* (1999), 174 D.L.R. (4th) 193, 1999 CarswellNat 1124, 1999 CarswellNat 1125, 243 N.R. 22, 1 Imm. L.R. (3d) 1, 14 Admin. L.R. (3d) 173, [1999] 2 S.C.R. 817 (S.C.C.) — referred to

*Bell ExpressVu Ltd. Partnership v. Rex* (2002), 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 100 B.C.L.R. (3d) 1, [2002] 5 W.W.R. 1, 212 D.L.R. (4th) 1, 287 N.R. 248, 18 C.P.R. (4th) 289, 166 B.C.A.C. 1, 271 W.A.C. 1, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559 (S.C.C.) — considered

*Capital District Health Authority v. N.S.G.E.U.* (2006), 2006 NSCA 44, 2006 CarswellINS 154 (N.S. C.A.) — considered

*Doctors Nova Scotia v. Nova Scotia (Department of Health)* (2006), 2006 NSCA 59, 2006 CarswellINS 195 (N.S. C.A.) — referred to

*Eldridge v. British Columbia (Attorney General)* (1997), 1997 CarswellBC 1939, 1997 CarswellBC 1940, 151 D.L.R. (4th) 577, 218 N.R. 161, 96 B.C.A.C. 81, 155 W.A.C. 81, [1998] 1 W.W.R. 50, 46 C.R.R. (2d) 189, 38 B.C.L.R. (3d) 1, [1997] 3 S.C.R. 624, 3 B.H.R.C. 137 (S.C.C.) — followed

*Granite Environmental Inc. v. Nova Scotia (Labour Relations Board)* (2005), 2005 NSCA 141, 2005 CarswellINS 471, 238 N.S.R. (2d) 59, 757 A.P.R. 59, 261 D.L.R. (4th) 98, 39 Admin. L.R. (4th) 292, (sub nom. *I.U.O.E., Local 721 v. Granite Environmental Inc.*) 120 C.L.R.B.R. (2d) 117 (N.S. C.A.) — referred to

*Johnson v. Nova Scotia* (2005), 2005 NSCA 99, 2005 CarswellINS 278, (sub nom. *Nova Scotia v. Johnson*) 256 D.L.R. (4th) 105, 87 L.C.R. 82, (sub nom. *Nova Scotia v. Johnson*) 234 N.S.R. (2d) 260, (sub nom. *Nova Scotia v. Johnson*) 745 A.P.R. 260 (N.S. C.A.) — considered

*N.S.T.U. v. Nova Scotia Community College* (2006), 2006 NSCA 22, 2006 CarswellINS 68 (N.S. C.A.) — referred to

*Nova Scotia (Minister of Health) v. G. (R.)* (2005), 232 N.S.R. (2d) 51, 737 A.P.R. 51, 2005 NSCA 59, 2005 CarswellINS 158, 15 E.T.R. (3d) 1 (N.S. C.A.) — referred to

*Nova Scotia Power Inc., Re* (May 24, 2000), Doc. NSUARB-NSPI-P-871 (N.S. Utility & Review Bd.) — referred to

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*Nova Scotia Power Inc., Re* (2003), 2003 NSUARB 91 (N.S. Utility & Review Bd.) — referred to

*Nova Scotia (Public Utilities Board) v. Nova Scotia Power Corp.* (1976), 18 N.S.R. (2d) 692, 20 A.P.R. 692, 75 D.L.R. (3d) 72, 1976 CarswellINS 190 (N.S. C.A.) — considered

*Parry Sound (District) Welfare Administration Board v. O.P.S.E.U., Local 324* (2003), (sub nom. *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*) 230 D.L.R. (4th) 257, (sub nom. *Social Services Administration Board (Parry Sound) v. Ontario Public Service Employees Union, Local 324*) 308 N.R. 271, (sub nom. *Social Services Administration Board (Parry Sound District) v. Ontario Public Service Employees Union, Local 324*) 177 O.A.C. 235, (sub nom. *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*) [2003] 2 S.C.R. 157, 31 C.C.E.L. (3d) 1, 47 C.H.R.R. D/182, 2003 SCC 42, 2003 CarswellOnt 3500, 2003 CarswellOnt 3501, 2003 C.L.L.C. 220-062, 7 Admin. L.R. (4th) 177 (S.C.C.) — referred to

*Pushpanathan v. Canada (Minister of Employment & Immigration)* (1998), 226 N.R. 201, (sub nom. *Pushpanathan v. Canada (Minister of Citizenship & Immigration)*) 160 D.L.R. (4th) 193, (sub nom. *Pushpanathan v. Canada (Minister of Citizenship & Immigration)*) [1998] 1 S.C.R. 982, 1998 CarswellNat 830, 1998 CarswellNat 831, 43 Imm. L.R. (2d) 117, 11 Admin. L.R. (3d) 1, 6 B.H.R.C. 387, [1999] I.N.L.R. 36 (S.C.C.) — referred to

*Q. v. College of Physicians & Surgeons (British Columbia)* (2003), (sub nom. *Dr. Q. v. College of Physicians & Surgeons of British Columbia*) [2003] 1 S.C.R. 226, 2003 SCC 19, 2003 CarswellBC 713, 2003 CarswellBC 743, 11 B.C.L.R. (4th) 1, [2003] 5 W.W.R. 1, 223 D.L.R. (4th) 599, 48 Admin. L.R. (3d) 1, (sub nom. *Dr. Q., Re*) 302 N.R. 34, (sub nom. *Dr. Q., Re*) 179 B.C.A.C. 170, (sub nom. *Dr. Q., Re*) 295 W.A.C. 170 (S.C.C.) — referred to

*R. v. Jackpine* (2006), 2006 SCC 15, 2006 CarswellOnt 2498, 2006 CarswellOnt 2499, 37 C.R. (6th) 1 (S.C.C.) — considered

*R. v. Sharpe* (2001), 2001 SCC 2, 2001 CarswellBC 82, 2001 CarswellBC 83, 194 D.L.R. (4th) 1, 150 C.C.C. (3d) 321, 39 C.R. (5th) 72, 264 N.R. 201, 146 B.C.A.C. 161, 239 W.A.C. 161, 88 B.C.L.R. (3d) 1, [2001] 6 W.W.R. 1, [2001] 1 S.C.R. 45, 86 C.R.R. (2d) 1 (S.C.C.) — referred to

*Ryan v. Law Society (New Brunswick)* (2003), (sub nom. *Law Society of New Brunswick v. Ryan*) [2003] 1 S.C.R. 247, 2003 SCC 20, 2003 CarswellNB 145, 2003 CarswellNB 146, 223 D.L.R. (4th) 577, 48 Admin. L.R. (3d) 33, 302 N.R. 1, 257 N.B.R. (2d) 207, 674 A.P.R. 207, 31 C.P.C. (5th) 1 (S.C.C.) — referred to

*Voice Construction Ltd. v. Construction & General Workers' Union, Local 92* (2004), 2004 SCC 23, [2004] 1 S.C.R. 609, [2004] 7 W.W.R. 411, 14 Admin. L.R. (4th) 165, 29 Alta. L.R. (4th) 1, 2004 CarswellAlta 422, 2004 CarswellAlta 423, (sub nom. *Construction & General Workers' Union, Local 92 v. Voice Construction Ltd.*) 2004 C.L.L.C. 220-026 (S.C.C.) — referred to

#### Statutes considered:

*Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — considered

s. 15 — referred to

*Public Utilities Act*, R.S.N.S. 1989, c. 380

Generally — considered

s. 2(f) "service" (iii) — considered

s. 42 — referred to

s. 44 — considered

s. 52 — considered

s. 63(1) — referred to

s. 64(1) — considered

s. 67(1) — considered

s. 73(3) — considered

s. 86 — considered

s. 107 — considered

*Telecommunications Act*, S.C. 1993, c. 38

s. 7 — referred to

s. 47(a) — considered

*Utility and Review Board Act*, S.N.S. 1992, c. 11

Generally — referred to

s. 26 — considered

s. 30(1) — considered

APPEAL by intervenor from board's decision to decline to consider proposal.

***Fichaud J.A.:***

1 Nova Scotia Power applied to the Utility and Review Board for a rate increase. Dalhousie Legal Aid intervened and requested that the Board approve a program featuring power rate credits for low income customers. The Board declined. The Board was of the view that the legislation did not authorize the Board to reduce power rates based on the income level of the customer. Dalhousie Legal Aid appeals. The issue is whether the Board committed reviewable error by concluding that it had no statutory authority to adopt a rate assistance program for low income customers.

**Background**

2 Nova Scotia Power Incorporated ("NSP") produces and supplies electrical energy. As of December 31, 2003, NSP served approximately 460,000 customers throughout Nova Scotia. NSP is the successor to the Nova Scotia Power Corporation, a Crown corporation that was privatized in 1992. In January 1999, NSP became the principal subsidiary of what is now Emera Incorporated.

3 NSP is a public utility regulated under the *Public Utilities Act* RSNS 1989, c. 380, as amended. Section 64(1) reads:

64 (1) No public utility shall charge, demand, collect or receive any compensation for any service performed by it until such public utility has first submitted for the approval of the Board a schedule of rates, tolls and charges and has obtained the approval of the Board thereof.

The "Board" is the Nova Scotia Utility and Review Board, created by the *Utility and Review Board Act* SNS 1992, c. 11, as amended ("*URB Act*").

4 In May 2004 NSP filed with the Board an application for approval of increased rates, followed by a revised application in June 2004. The application would have resulted in an average overall increase of 12.4% for all classes of customer.

5 The Board gave notice by advertisement as provided in s. 86 of the *Public Utilities Act*. Thirty-seven intervenors responded. One intervenor was the appellant Dalhousie Legal Aid Service ("DLA").

6 The Board conducted a public hearing over 16 days between November 16, 2004 and January 14, 2005. On March 31, 2005 the Board issued a decision (2005 NSUARB 27). The decision dealt with NSP's requested rate increase and related topics.

Only one topic is relevant to this appeal. That is DLA's request that the Board approve a Rate Assistance Program for low income consumers of power.

7 The Board's decision summarized DLA's submission:

### 9.1 Rate Assistance Program (RAP)

[246] While DLAS has opposed the approval of a FAM [Fuel Adjustment Mechanism] and the SA [Settlement Agreement], and has detailed concerns regarding aspects of customer service provided by NSPI, its main focus at the hearing was the implementation of a proposed Rate Assistance Program ("RAP") to help low-income customers meet their electricity costs.

[247] DLAS filed evidence from several individuals, including Dr. Richard Shillington, a principal of Tristat Resources and Roger Colton, a principal of Fisher, Sheehan & Colton, with respect to this issue. Dr. Shillington, in his direct evidence (Exhibit N-126), outlined the challenging costs of shelter and electricity for low-income Canadians. Mr. Colton's evidence focused on low-income energy assistance programs and his efforts, in a number of US states, in designing rate affordability programs. Mr. Colton's position is that NSPI should "... be directed toward allowing low-income consumers to obtain quality utility service at affordable prices within a reasonable budget constraint." Mr. Colton also submits that the costs of such a program, to be shared by customers, are offset, although perhaps not fully, by savings realized by the Utility resulting from the adoption of a 'universal service program'.

Mr. Colton's report summarized his fixed credit proposal:

Although a variety of percentage-of-income based approaches exists, I recommend the delivery of rate affordability assistance using a fixed credit approach. The fixed credit approach begins as an income-based approach. In order to be eligible for the rate, a household must meet *both* eligibility criteria: (1) that the household income is at or below the Low-Income Cutoff (LICO) for Nova Scotia; and (2) that the household electric burden exceeds the burden deemed to be affordable.

The fixed credit approach differs from a straight percentage of income approach in the calculation of the bill to the household. The fixed credit calculates what bill credit would need to be provided to the household in order to reduce the household's energy bill to a designated percent of income. To calculate the fixed credit involves three steps: (1) calculating a burden-based payment; (2) calculating an annual bill; and (3) calculating the fixed credit necessary to reduce the annual bill to the burden based payment. Each step is explained below.

1. The first step in the fixed credit model is to calculate a burden-based payment. Assume that the household has an annual income of \$8,000 and is required to pay three percent (3%) for its home energy bill. The required household payment is thus \$240. This is simply  $\$8,000 \times 3\% = \$240$ .

Distinctions are also made between heating and non-heating customers. A heating customer should be asked to pay six percent (6%) of the household's income toward her home heating bill, while a non-heating customer would be asked to pay three percent (3%) toward his or her electric bill.

2. The next step is to calculate a projected annual household energy bill. This calculation is to be made using whatever method NSPI *currently* uses to estimate annual bills for other purposes. NSPI, in other words, has an established procedure for estimating an annual bill for purposes of placing residential customers (low-income or not) on a levelized Budget Billing Plan (where bills are paid in equal installments over 12 months). Let me assume for purposes of illustration that this existing process results in an estimated annual bill of \$960.

3. The final step is to calculate the necessary fixed credit to bring the annual bill down to the burden-based payment. Given an annual bill projection of \$960 and a burden-based payment of \$240, the annual fixed credit would need to be \$720 ( $\$960 - \$240 = \$720$ ). The household's *monthly* fixed credit would be \$60 ( $\$720 / 12 = \$60$ ).

8 The Board, in response to DLA's request, cited s. 67(1) of the *Public Utilities Act*.

67 (1) All tolls, rates and charges shall always, under substantially similar circumstances and conditions in respect of service of the same description, be charged equally to all persons and at the same rate, and the Board may by regulation declare what shall constitute substantially similar circumstances and conditions.

The Board accepted that "all customers, regardless of income, receive 'substantially similar' electrical service from NSP". The Board concluded that it had no power to consider DLA's proposed Rate Assistance Program:

[256] After reviewing the submissions of DLAS, Board Counsel and the relevant provisions of the **Act**, the Board finds that it does not have the statutory authority to approve a RAP. The Board has the authority given to it by the Legislature to perform its duties in accordance with the provisions of the **Act**. The Board's role is to make decisions, based on fact and law, within the parameters of the statutory authority it has been given by the Legislature. The Board's duty is to follow public policy decisions made by the Legislature and expressed in statutes. The Board does not have jurisdiction to establish public policy. That is the role of elected officials who are accountable to the public for this function. It seems almost certain that the RAP, as described by Mr. Colton, would result in the electricity bills of certain customers, depending on their income, being subsidized by other customers. In the Board's view, this is a social and public policy question which falls within the purview of the Legislature rather than the Board. Should NSPI and DLAS wish to pursue this matter with Government, the Board would be pleased to offer assistance with respect to regulatory and ratemaking principles.

9 DLA appeals under s. 30(1) of the *URB Act*, permitting an appeal based on an error of law or jurisdiction.

#### Issue

10 The issue is whether the Board committed an appealable error by declining to consider the merits of DLA's proposed Rate Assistance Program for low income electricity customers.

#### Standard of Review

11 Under the pragmatic and functional approach, the court analyses the cumulative effect of four contextual factors: the presence, absence or wording of a privative clause or statutory appeal; the comparative expertise of the tribunal and the court on the appealed or reviewed issues; the purpose of the governing legislation; and the nature of the question, fact, law or mixed. The ultimate question is whether the legislature intended that the issue under review be left to the tribunal. From this analysis the court selects, for each issue, a standard of review of correctness, reasonableness or patent unreasonableness: *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.), at ¶ 26; *Q. v. College of Physicians & Surgeons (British Columbia)*, [2003] 1 S.C.R. 226 (S.C.C.), at ¶ 26-35; *Ryan v. Law Society (New Brunswick)*, [2003] 1 S.C.R. 247 (S.C.C.), at ¶ 27; *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] 1 S.C.R. 609 (S.C.C.) at ¶ 15-19; *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.), at ¶ 55-62; *Granite Environmental Inc. v. Nova Scotia (Labour Relations Board)*, 2005 NSCA 141 (N.S. C.A.), at ¶ 21; *N.S.T.U. v. Nova Scotia Community College*, 2006 NSCA 22 (N.S. C.A.), at ¶ 11; *Capital District Health Authority v. N.S.G.E.U.*, 2006 NSCA 44 (N.S. C.A.), at ¶ 36.

12 In *Johnson v. Nova Scotia*, 2005 NSCA 99 (N.S. C.A.), at ¶ 33-46, Justice Oland applied the four contextual factors to the expropriation powers of the Utility and Review Board, and concluded:

[46] After considering the four contextual factors of the functional and pragmatic approach, in my view the standard of review to be applied to questions of law, such as any entitlement for compensation for owner's time and for pension loss, the standard of review is correctness. For questions of mixed law and fact, such as matters related to compensation for market value and injurious affection, the standard is patent unreasonableness. For findings of fact, the standard is patent unreasonableness.

Though there is correspondence among the Board's different functions, the pragmatic and functional analysis for expropriation is not necessarily commutable to rate-making. So I will consider the four contextual factors from the perspective of utility rating.

13 Section 26 of the *URB Act* says that the Board's findings of fact are "binding and conclusive", while s. 30(1) prescribes an appeal to this court on questions of law or jurisdiction. The Legislature contemplated a serious judicial role in the review for legal error, particularly on threshold issues.

14 Section 44 of the *Public Utilities Act* entitles the Board to fix rates "as it deems just". Section 67(1) quoted earlier directs equal charges for "similar circumstances and conditions" of service and authorizes the Board to enact regulations that define "substantially similar circumstances and conditions". The Board has a standing membership, repeatedly has examined NSP rate applications and has developed a body of governing jurisprudence. Clearly, the Board has more expertise than the court in the architecture of rate-making.

15 In *Nova Scotia (Public Utilities Board) v. Nova Scotia Power Corp.* (1976), 18 N.S.R. (2d) 692 (N.S. C.A.), at ¶ 17, Chief Justice MacKeigan summarized the purposes of the *Public Utilities Act*:

17 The scheme of regulation established by the Act envisages and indeed compels control by the Board of all aspects of a utility's operation in providing a controlled service. Two great objects are enshrined — that all rates charged must be just, reasonable and sufficient and not discriminatory or preferential, and that the service must be adequately, efficiently and reasonably supplied to the public. Almost all provisions of the Act are directed toward securing these two objects — that a public utility give adequate service and charge only reasonable and just rates.

The legislation considered by Chief Justice MacKeigan included ss. 42 and 63(1), the equivalents to the current ss. 44 and 67(1) that are central to this appeal (see *NS (PUB)* at ¶ 15, 28).

16 DLA says its argument is "jurisdictional" and therefore the standard of review must be correctness. It may be that, after the court reviews the four contextual factors, true jurisdictional issues usually will attract the correctness standard. But I disagree that every labelled "jurisdictional" argument is tethered to correctness, and I reiterate this court's comment in *Capital District Health Authority v. N.S.G.E.U.* :

[28] . . . The court no longer reviews for pigeonholed "jurisdictional errors." The phrase "goes to jurisdiction" describes a type of issue for which the proper standard of review is correctness, after the reviewing court has performed the pragmatic and functional analysis. But the "jurisdictional" inquiry is not a substitute for the pragmatic and functional approach. [Citing *Pushpanathan* at ¶ 28; *Dr. Q.* at ¶ 20-25; *Voice* at ¶ 21; *Granite* at ¶ 41(b) and *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4 (S.C.C.) at ¶ 21-32.]

17 A similar issue arose in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4 (S.C.C.) . A public utility applied to Alberta's Energy and Utilities Board for approval of a sale of assets and allocation of the sale proceeds. The Board allocated a portion of the proceeds of sale to the rate-paying customers. On appeal from the judicial review, the Supreme Court of Canada considered whether the Board had statutory authority to allocate any sale proceeds to the ratepayers. Despite the "jurisdictional" aspect of the issue, Justice Bastarache for the majority said that the pragmatic and functional analysis was necessary:

23 In the case at bar, one should avoid a hasty characterizing of the issue as "jurisdictional" and subsequently be tempted to skip the pragmatic and functional analysis. A complete examination of the factors is required.

In *ATCO*, a threshold issue of statutory interpretation determined whether the Board could exercise its core functions. Justice Bastarache selected a correctness standard, having reasoned as follows:

30 While at first blush the purposes of the relevant statutes and of the Board can be conceived as a delicate balancing between different constituencies, i.e., the utility and the customer, and therefore entail determinations which are polycentric (*Pushpanathan*, at para. 36), the interpretation of the enabling statutes and the particular provisions under review (s. 26(2)(d) GUA and s. 15(3)(d) AEUBA) is not a polycentric question, contrary to the conclusion of the Court of Appeal. It is an inquiry into whether a proper construction of the enabling statutes gives the Board jurisdiction to allocate the profits

realized from the sale of an asset. The Board was not created with the main purpose of interpreting the AEUBA, the GUA or the PUBA in the abstract, where no policy consideration is at issue, but rather to ensure that utility rates are always just and reasonable (see *Atco Ltd.*, at p. 576). In the case at bar, this protective role does not come into play. Hence, this factor points to a less deferential standard of review.

31 Fourth, the nature of the problem underlying each issue is different. The parties are in essence asking the Court to answer two questions (as I have set out above), the first of which is to determine whether the power to dispose of the proceeds of sale falls within the Board's statutory mandate. The Board, in its decision, determined that it had the power to allocate a portion of the proceeds of a sale of utility assets to the ratepayers; it based its decision on its statutory powers, the equitable principles rooted in the "regulatory compact" (see para. 63 of these reasons ) and previous practice. This question is undoubtedly one of law and jurisdiction. The Board would arguably have no greater expertise with regard to this issue than the courts. A court is called upon to interpret provisions that have no technical aspect, in contrast with the provision disputed in *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476, 2003 SCC 28, at para. 86. The interpretation of general concepts such as "public interest" and "conditions" (as found in s. 15(3)(d) of the AEUBA ) is not foreign to courts and is not derived from an area where the tribunal has been held to have greater expertise than the courts. ...

32 In light of the four factors, I conclude that each question requires a distinct standard of review. To determine the Board's power to allocate proceeds from a sale of utility assets suggests a standard of review of correctness. As expressed by the Court of Appeal, the focus of this inquiry remains on the particular provisions being invoked and interpreted by the tribunal (s. 26(2)(d) of the GUA and s. 15(3)(d) of the AEUBA) and "goes to jurisdiction" (*Pushpanathan*, at para. 28). Moreover, keeping in mind all the factors discussed, the generality of the proposition will be an additional factor in favour of the imposition of a correctness standard, as I stated in *Pushpanathan*, at para. 38:

... the broader the propositions asserted, and the further the implications of such decisions stray from the core expertise of the tribunal, the less likelihood that deference will be shown. Without an implied or express legislative intent to the contrary as manifested in the criteria above, legislatures should be assumed to have left highly generalized propositions of law to courts.

18 The Board's rate-making power is a core function entitled to deference. But the issue here is whether the statute precludes the Board from exercising that power. After considering the four contextual factors, and given the statutory right of appeal and the comments in *ATCO*, in my view the Legislature intended no deference on that issue. The threshold legal question is governed by a correctness standard.

### **Did the Board Err in Law by Declining to Consider the Rate Assistance Program?**

19 This is a question of statutory interpretation. The words of a statute are read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the *Act*, the object of the *Act* and the intention of the Legislature: *Parry Sound (District) Welfare Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42 (S.C.C.) , at ¶ 41; *R. v. Sharpe*, [2001] 1 S.C.R. 45 (S.C.C.) at ¶ 33; *Nova Scotia (Minister of Health) v. G. (R.)*, 2005 NSCA 59 (N.S. C.A.) , at ¶ 24; *Doctors Nova Scotia v. Nova Scotia (Department of Health)*, 2006 NSCA 59 (N.S. C.A.) , at ¶ 25.

20 DLA focusses on the grammatical and ordinary meaning of the Board's general rate-making power in s. 44 of the *Public Utilities Act*:

44 The Board may make from time to time such orders as it deems just in respect to the tolls, rates and charges to be paid to any public utility for services rendered or facilities provided, and amend or rescind such orders or make new orders in substitution therefor.

DLA submits that the Board is mandated to consider whether a rate assistance program for low income customers is "just".

21 The court must also grapple with the basis of the Board's ruling, s. 67(1):



67 (1) All tolls, rates and charges shall always, under substantially similar circumstances and conditions in respect of service of the same description, be charged equally to all persons and at the same rate, and the Board may by regulation declare what shall constitute substantially similar circumstances and conditions.

DLA says that its Rate Assistance Program would provide a credit against the rate, but would not alter the rate itself. DLA says that s. 67(1) refers to pure "rates", not credits, and is irrelevant to DLA's Program.

22 In my respectful view, DLA's rate/credit distinction is artificial and analytically flawed. A gross rate subject to an automatic credit is just a net rate charged to the customer by NSP. The "charge" under s. 67(1) is the net amount. The Board's "rate" making power is not a blind stab at gross revenue. The rating involves a projection of NSP's expenses, net income and rate of return. The Board must consider the effect of a credit against rates just as it must consider NSP's expenses to generate power. DLA cites s. 44 of the *Public Utilities Act* as authority for its Rate Assistance Program, including the credit. Yet, s. 44, quoted earlier, empowers the Board to approve "tolls, rates and charges", saying nothing of "credits". Rate credits are integrated with "rates and charges" in s. 67(1) no less than rate credits pertain to the Board's "rating" power in s. 44, upon which DLA relies.

23 DLA's factum said that low income customers do not have "substantially similar circumstances" to higher income customers. So, different rates would not be barred by s. 67(1). At the appeal hearing DLA's counsel retreated somewhat from this submission.

24 With respect, the factum's submission misinterprets s. 67(1). The provision refers to "substantially similar circumstances and conditions *in respect of service of the same description.*" To justify a rate difference, the relevant dissimilarity is not in customers' incomes. It is in the service from NSP. The Board accepted, and there is no basis to question, that NSP provides substantially similar electrical service whatever the domestic customer's income.

25 Section 67(1) is mandatory. The rates and charges "shall always . . . be charged equally" to persons of similar circumstances and conditions in respect of service. The statute does not endow the Board with discretion to consider the social justice of reduced rates for low income customers. It is not for the Board or this court to read into s. 67(1) the words:

. . . similar circumstances and conditions in respect of *the income level of customers and* service of the same description,

It is for the Legislature to decide whether to expand the Board's purview with the italicized words.

26 This point is illustrated by *Allstream Corp. v. Bell Canada*, 2005 FCA 247 (F.C.A.), cited by DLA. The Federal Court of Appeal upheld the decision of the CRTC to provide low rates to schools and municipalities for fibre optic service. DLA's factum says:

This case stands for the proposition that the jurisdiction to regulate utilities *includes* non cost-based rates and by analogy would include programs similar to a rate assistance program for low income consumers. [emphasis in original]

27 I disagree with DLA's measure of *Allstream's* reach. The Federal Court of Appeal said:

34. ... It is apparent that the Commission was greatly concerned about the effect of a denial of services on the communities concerned and the dislocation of complex equipment and facility configurations at a significant cost and to the detriment of school boards and municipalities in the relevant areas and that such concerns outweighed, in its view, Bell's failure to seek prior approval of these rates. These are considerations that a specialized board can entertain and weigh relative to other considerations. It is true that these considerations are not purely economic in the sense referred to by the appellant such as costs, investment, allowance for necessary working capital, rate of return, etc. These considerations, however, are *part of the Commission's wide mandate under section 7*, a mandate it alone possesses and are quite distinct from the grant of a rate under paragraph 27(6)(b) of the Act, a power the Commission did not invoke. [emphasis added]

Section 47(a) of the *Telecommunications Act*, S.C. 1993, c. 38 directed the CRTC to implement the telecommunications policy objectives from s. 7. Those included enriching the "social and economic fabric", rendering "affordable" and "accessible" service,

and responding to "the economic and social requirements of users." [legislation quoted in ¶ 10 of *Allstream*]. Nova Scotia's Utility and Review Board has no such statutory mandate.

28 The grammatical and ordinary interpretation of s. 67(1), outlined above, is consistent with the statutory context, scheme and object of the Act, and intention of the Legislature.

29 The Act connects the Board's rate-making to NSP's "service". Section 2(f) of the *Public Utilities Act* defines "service" as including:

(iii) the production, transmission, delivery or furnishing to or for the public by a public utility for compensation of electrical energy for purposes of heat, light and power,

Section 44 authorizes the Board to make rates "for services rendered or facilities provided". Section 52 requires the public utility to "furnish services and facilities that are adequate, just and reasonable". Section 64(1) prohibits the utility from charging compensation for any "service" until the Board has approved the rate for that service. Section 107, entitled "offence and penalty for unjust discrimination", prohibits the utility from charging "for any service" a rate that is higher or lower than charged to any other person "for a like and contemporaneous service".

30 Section 73 of the *Public Utilities Act* allows preferential rates for

(3) . . . a senior citizens club, service club, volunteer fire department, a Royal Canadian Legion, community hall or recreational facility owned by a community and used for general community purposes, a charitable or religious organization or institution . . .

and authorizes the Lieutenant Governor-in-Council to extend this list by order-in-council.

31 The legislative context ties the Board's rate levels to the utility's services. The Legislature enacts, or assigns to order-in-council, non-compliant rates for specific classes of customer based on social criteria.

32 The Board sets rates for a utility that has a virtual monopoly on the supply of electric power. The Board's decision discusses this process: (2005 NSUAR 27)

[17] . . . NSPI is not like an unregulated retailer. It is a virtual monopoly which operates its business on a cost-of-service basis. Providing electricity to all communities in the Province was not (and likely still is not) financially feasible for private, competitive companies. For that reason, the Province's electric service supplier is a cost-of-service monopoly. In return for undertaking and continuing the costs of electrification of the Province, the utility is permitted, under the *Act*, to recover the reasonable and prudent costs of providing the service. Because it is a monopoly, regulation operates as a surrogate for competition. One of the regulator's tasks is to balance the need for the Utility to recover its reasonable and prudent costs with the need to ensure that ratepayers are charged fair and reasonable rates.

[18] It is in the interests of all Nova Scotians to ensure that NSPI continues to be a stable and financially sound company. This is a reality which the Board must consider when determining what, if any, rate increase is warranted.

[19] In short, rates charged to customers are based on costs incurred by the Utility in providing service. If the Board finds certain costs to be imprudent or unreasonable, it can (and has) disallowed such expenditures and reduced proposed rate increases accordingly.

33 I agree with this portrayal of the background to the Board's rate-making function. The Board's regulatory power is a proxy for competition, not an instrument of social policy.

34 DLA points to the Board's approval of rates that prefer large industrial power customers. In *Nova Scotia Power Inc., Re*, [2000] N.S.U.R.B.D. No. 72 (N.S. Utility & Review Bd.), the Board approved NSP's application for a load retention rate. This

rate would be determined between the individual customer and NSP, then submitted to the Board for approval. Paragraph 5 of the Board's decision describes the features of NSP's proposed load retention rate:

5 NSPI states in its application that "the proposed rate is an appropriate approach to retaining existing customers who, in the absence of this rate, would reduce their purchases from the Company, to the detriment of all other customers". The rate would be available to customers "who are considering an alternate supply of at least 2000 KVA or 1800 KW". It would not be available for new load. The rate would only be available if the following conditions are satisfied:

1. The customer's option to use a supply of power and energy (alternate supply) other than NSPI's is both technically and economically feasible.
2. Retaining the customer's load, at the price offered by this rate, is better for other electric customers than losing the customer load in question.
3. The price offered by this rate is not less than that necessary to make the customer in question indifferent with respect to alternate supply versus continuing to purchase the electric power and energy from NSPI.

DLA says that, if the Board can approve a load retention rate for large industrial customers, then it can approve a rate assistance program for low income customers.

35 The Board's decision in [2000] N.S.U.R.B.D. No. 72 (N.S. Utility & Review Bd.) is not under appeal. Neither are its decisions on similar issues such as the extra large industrial interruptible rate: *Nova Scotia Power Inc., Re*, 2003 NSUARB 6 (N.S. Utility & Review Bd.) and *Nova Scotia Power Inc., Re*, 2003 NSUARB 91 (N.S. Utility & Review Bd.) . I make no comment on those rulings, except to say that they do not support DLA's submission here that the Board can implement social policy. The Board's approval of the load retention rate was premised on the finding that, otherwise, the large customer could leave NSP, obtain its energy from another source, and this would hike NSP's rates to its remaining customers. The Board's approach affirms the Board's role as a competition surrogate. The Board's load retention rate recognizes the microeconomic reality that NSP is not an absolute energy monopoly with a vertical customer demand curve, and is subject to elastic demand from high volume customers with other energy options. No such factors govern DLA's proposed Rate Assistance Program.

36 DLA says that legislation should be interpreted in a manner that is consistent with the *Charter of Rights and Freedoms*. DLA's counsel makes a forceful submission that the impoverished are a protected category under s. 15 and, following *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 (S.C.C.), this court may direct the institution of a program to ameliorate their disadvantage. DLA's submission is interpretive and does not challenge the validity of the legislation.

37 I make no comment on s. 15. The statutory language does not accommodate the suggested construction.

38 The constructive principle applies only when the statute is ambiguous. In *R. v. Jackpine*, 2006 SCC 15 (S.C.C.) , at ¶ 18, Justice Charron for the majority said:

It has long been accepted that courts should apply and develop common law rules in accordance with the values and principles enshrined in the *Charter*: *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at p. 603; *Cloutier v. Langlois*, [1990] 1 S.C.R. 158, at p. 184; *R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 675; *R. v. Golden*, [2001] 3 S.C.R. 679, 2001 SCC 83, at para. 86; *R. v. Mann*, [2004] 3 S.C.R. 59, 2004 SCC 52, at paras.17-19. However, it is equally well settled that, in the interpretation of a statute, *Charter* values as an interpretative tool can only play a role where there is a genuine ambiguity in the legislation. In other words, where the legislation permits two different, yet equally plausible, interpretations, each of which is equally consistent with the apparent purpose of the statute, it is appropriate to prefer the interpretation that accords with *Charter* principles. However, where a statute is not ambiguous, the court must give effect to the clearly expressed legislative intent and not use the *Charter* to achieve a different result. In *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 62, Iacobucci J., writing for a unanimous court, firmly reiterated this rule:

... to the extent this Court has recognized a "*Charter values*" interpretive principle, such principle can only receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations. [Emphasis in original.]

To the same effect: *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.) at ¶ 27-30, 60-66.

39 Section 67(1) is not ambiguous: "rates . . . shall always . . . be charged equally to all persons and at the same rate" in substantially similar "circumstances and conditions in respect of service of the same description". The Board cannot reduce the rate to a low income customer who receives the same service as a high income customer. There is no latitude for the interpretive presumption.

### Conclusion

40 The Board did not err in its conclusion that s. 67(1) precludes the Board from considering DLA's rate assistance program for low income customers. I would dismiss the appeal without costs.

*Appeal dismissed.*